RECORD, CASE No. 13,646.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~424~~. 95

D. M. OSBORNE & COMPANY, APPELLANT,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 23, 1889.

RECORD, CASE No. 13,646.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 424.

D. M. OSBORNE & COMPANY, APPELLANT,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Citation and proof of service	*a*	1
Bill of complaint	1	1
Amended answer	5	5
Exceptions and demurrer to amended answer	12	9
Order overruling exceptions and demurrer to amended answer	14	10
Replication	14	10
Evidence for complainant	16	11
Testimony of David F. Kaime	16	11
Frank W. Terpening	20	13
F. W. Drury	40	28
Otto Schmitz	49	35
S. J. Fisher	52	37
Charles F. Vogel	56	40
David F. Kaime (recalled)	58	42
Oscar D. Carpenter	62	45
Diederich Norden	64	46
Julius Pitzman	67	48

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 4, 1892.

	Original.	Print.
Testimony of —— Morrison	71	52
J. W. H. Higbee	75	54
James M. Peters	81	59
Evidence for defendant	84	61
Testimony of J. B. Clements	84	61
William F. Foley	85	62
—— Field	90	66
John H. Terry	95	69
J. M. Carpenter	98	72
Marcus A. Wolff	103	76
C. H. Sholer	109	80
Decree	113	82
Motion for rehearing	113	83
Motion for rehearing heard and submitted	115	84
Order denying motion for rehearing	115	84
Appeal allowed; appeal bond approved	116	84
Appeal bond	117	85
Opinion on exceptions and demurrer to amended answer	118	86
Opinion on final hearing	122	88
Plaintiff's Exhibit B (map)	126	90
Defendant's Exhibit No. 2 (map)	127	90
Plaintiff's Exhibit A, certificate of incorporation	128	91
Defendant's Exhibit No. 1, ordinance No. 13897	131	92
Clerk's certificate	134	94

a The United States of America to the Missouri Pacific Railway Company, Greeting:

Whereas D. M. Osborne & Company has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, made in favor of you, the said Missouri Pacific Railway Company, and has filed the security required by law; you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Witness the Honorable Amos M. Thayer, judge of the circuit court of the United States for the eastern district of Missouri, this fourth day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

AMOS M. THAYER,
Judge United States District Court,
Eastern District of Missouri.

Service of citation waived this 4th day of September, A. D. 1889.

BENNETT PIKE &
T. J. PORTIS,
Att'ys for Def't.

1 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States in and for the Eastern Division of said District.

Be it remembered that on the sixteenth day of February, A. D. 1887, there was filed in the office of the clerk of the circuit court of the United States in and for the eastern district of Missouri a certain bill in equity, in words and figures following, to wit:

Bill of Complaint.

D. M. OSBORNE & Co., a Corporation, Complainants,
vs.
MISSOURI PACIFIC RAILWAY Co., Defendant.

In the Circuit Court of the United States for the Eastern District of Missouri.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

To the judge of the circuit court of the United States for the eastern district of Missouri:

D. M. Osborne & Company, a corporation duly created and exist-

ing under and by virtue of the laws of the State of New York, a citizen of the State of New York and a resident thereof, bring this their bill against Missouri Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Missouri and located in the eastern district of Missouri and a citizen and resident thereof and of the eastern district thereof, wherein the matter in controversy, exclusive of costs, exceeds the sum of five hundred dollars.

And thereupon your orator complains and says that your
2 orator is the owner of certain real estate in the city of St. Louis and State of Missouri situated on the northwest corner of Twenty-second and Gratiot streets, having a frontage on Gratiot street of one hundred and eighty-eight feet, beginning at the corner of Twenty-second and Gratiot streets and extending westwardly on the north line of Gratiot street by a depth northwardly to the tracks of the Missouri Pacific Railway Company one hundred and ten feet, more or less; that on this real estate on the eastern one hundred feet thereof your orator has erected a brick structure four stories high, with basement under the same, and that the said real estate, with the said improvements and building thereon, are worth a large sum of money, to wit, seventy-five thousand dollars; that said building is erected on Gratiot street, with its front on Gratiot street, and extending to the railroad tracks of defendant in the rear; that said building is so constructed that the only front which is adapted for receiving and shipping freight from the street is the Gratiot-street front; that said Gratiot street is a narrow street having a width of twenty-four feet from curb to curb; that the eighty-eight feet of ground immediately west of their present building is about to be occupied by your orator with an additional building similar in structure to that now occupying the one hundred feet directly west of Twenty-second street; that when so occupied the property of your orator will be bounded on the north by railroad tracks of the defendant, on the east by Twenty-second street, on the south by Gratiot street, and on the west by property owned by the defendant; that when said building is so constructed according to the original plan there will be no entrance to the same on any street except Gratiot street; that the defendant, The Missouri Pacific Railway Company,
intending to wrong and injure your orator and the public,
3 threaten to and have prepared to occupy and obstruct said Gratiot street from a point near the corner of Twenty-third and Gratiot streets along said Gratiot street to the property of the St. Louis Wire Mill Company, a corporation, the property of which corporation is situated near the corner of Twenty-first and Gratiot streets, in said city of St. Louis, with the permanent obstruction of the road-bed and iron track of a railroad to be operated by steam locomotives for the private use and gain of the said St. Louis wire mill, and with the obstruction of their cars to be hauled to and fro over the same; that said obstruction is at the suggestion and for the benefit of said St. Louis Wire Mill Company and to the great injury of your orator and of the public; that said proposed railway line and the operation of the same will render the use of said Gratiot

street so dangerous to your orator and the public and so obstruct the same with said railroad track laid upon the surface thereof and with running and standing cars and steam locomotives thereon as to prevent the use of said street by your orator and the public, as allowed by law, and will divert and turn away the travel from the same to other streets; that it will be impossible for a wagon and team to remain on the Gratiot-street front of your orator's property while cars are being moved or may be standing on the same, and that it will not be safe to use said Gratiot street by teams or wagons, to the great unascertainable and irreparable damage of your orator's business.

Your orator further states that said wire mill company is one of the largest of the country, and receives and ships a large amount of material and manufactured product, which it is intended to be and will be shipped and carried over said railroad track operated by steam locomotives if said track be permitted to be laid and constructed as threatened as aforesaid; that your orator verily
4 believes and avers the fact to be that not less than one hundred cars daily, on an average, with steam locomotives necessary to draw the same, are sought and threatened to be drawn over and upon the surface of said Gratiot street on said track, to the great wrong and injury of your orator and the public; that the defendant is proposing to occupy said track by transporting cars containing coal and material and manufactured product over said road during business hours in the daytime, thereby causing and continuing between said hours a practically complete obstruction and closing of said street and the monopoly of said street by said railway company for the private use of said St. Louis Wire Mill Company, to the exclusion of your orator and of the public and to the great and irreparable damage of the public and of your orator.

That the noise, the smoke, and the danger from fire and from shaking and vibration of your orator's building caused and occasioned by the passage of said cars and locomotives within such proximity as aforesaid to plaintiff's premises will render said premises less desirable and valuable as a place of business to your orator.

That all said damage threatened to be done your orator as aforesaid is irreparable in its nature and plaintiff cannot be fully compensated therefor in an action at law.

Your orator further avers that the defendant has collected and deposited the material for the construction of said track and is about to commence the construction of the same for the private use of the said wire mill company and to the obstruction and monopoly of said street of said wire mill company and of the defendant to such an extent that said street cannot be occupied by your orator and the public, all of which actions, purposes, and pretenses of said defend-
ant are contrary to equity and good conscience and tend to
5 the manifest wrong and injury of your orator in the premises; that the construction of said railroad track and the operation of the same will reduce the market value of the property of your

orator and damage the same in a sum in excess of thirty thousand dollars.

In consideration whereof and forasmuch as your orator is remediless according to the strict rules of law and can only have relief in a court of equity therefor, your orator prays that said defendant be restrained and enjoined from commencing or carrying out the proposed construction of any railroad track or switch or from taking possession of said Gratiot street for said purpose *of* from using said Gratiot street to the exclusion of your orator and the public and for all such other and further relief as may be necessary and proper.

And may it please your honor to grant to your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this court, directed to the Missouri Pacific Railway Company, commanding it, upon a day certain to be therein named and under penalty, to be and appear before this honorable court, then and there to answer all and singular the charges herein named, but not under oath, the answer of said defendant under oath being expressly waived, and to stand to, perform, and abide by such further order, direction, and decree of this court as may be made against it; and, as in duty bound, your orator will ever pray.

By MILLS AND FLITCRAFT,
Their Solicitors.

UNITED STATES OF AMERICA,
State of Missouri, City of St. Louis, } ss:

P. R. Flitcraft, one of the solicitors of the complainants in
6 the foregoing bill of complaint, appeared before me on the 16th day of February, eighteen hundred and eighty-seven, and made oath that he has read the above bill and knows the contents thereof and that the same is true of his own knowledge except as to the matters which are therein stated to be upon information and belief, and as to those things he believes them to be true, and that the reason why this affidavit is not made by one of the complainants is because they are absent from the State of Missouri and are not residents thereof.

P. R. FLITCRAFT.

Subscribed & sworn to before me this 16th day of February.

[SEAL.] A. P. SELBY, *Clerk*,
By T. L. CRAWFORD, *Deputy.*

And afterwards, to wit, on the eighth day of October, A. D. 1887, there was filed in said cause an amended answer in words and figures following, to wit:

Amended Answer.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *ss:*

In the Circuit Court of the United States for the Eastern District of Missouri.

D. M. OSBORNE & Co., Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

This defendant, now and at all times hereafter, saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for amended answer thereto, or to so much thereof as this defendant is advised it
7 is material and necessary for it to make answer to, answering, says:

It does not know and cannot set forth as to its belief or otherwise whether the said D. M. Osborne & Co. is a corporation duly created and existing under and by virtue of the laws of the State of New York and a resident thereof, as stated in complainants' bill.

Defe..dant further avers that it does not know and cannot set forth as to its belief or otherwise whether complainant is the owner of certain real estate in the city of St. Louis and State of Missouri, situated on the northwest corner of Twenty-second and Gratiot streets, having a frontage on Gratiot street of one hundred and eighty-eight feet, beginning at the corner of Twenty-second and Gratiot streets and extending westwardly on the north line of Gratiot street northwardly to the tracks of the Missouri Pacific Railway Company one hundred and ten feet, more or less, or whether on this real estate on the eastern one hundred feet thereof the said complainant has erected a brick structure four stories high, being, with the said real estate, of the value of seventy-five thousand dollars, or whether said building is so constructed that the only front which is adapted for receiving and shipping freight from the street is the Gratiot-street front, or that said Gratiot street is a narrow street, having a width of twenty-four feet from curb to curb, or that the eighty-eight feet of ground immediately west of said Osborne & Co.'s present building is about to be occupied by them with an additional building similar in structure to that occupying the one hundred feet directly west of 22nd street, or that when so occupied the property of said Osborne & Co. will be bounded on the north by railroad tracks of the defendant, on the east by 22nd street, on the south by Gratiot street, and on the west by property owned by defendant, or that
8 when said building is so constructed according to the original plan there will be no entrance to the same on any street except Gratiot street; denies that defendant, intending to wrong and injure complainant and the public, threatens to and has prepared to occupy and obstruct said Gratiot street from a point near

the corner of 23rd and Gratiot streets along said Gratiot street to the property of the St. Louis Wire Mill Company, situated near the corner of 21st and Gratiot streets, in said city of St. Louis, with the permanent obstruction of the road-bed and iron track of a railroad to be operated by steam locomotives for the private use and gain of the said St. Louis wire mill, and with the obstruction of their cars to be hauled to and fro over the same; avers that previous to the filing of the bill of complaint herein defendant had laid its switch track in said Gratiot street between the points above mentioned; denies that said alleged obstruction was made at the suggestion and for the benefit of said St. Louis Wire Mill Company, to the great injury of complainant and the public; denies that said railway line and the operation of the same will render the use of said Gratiot street so dangerous to complainants and the public and so obstruct the same with said railroad track laid upon the surface thereof and with running and standing cars and steam locomotives thereon as to prevent the use of said street by complainants and the public, as allowed by law, and will divert and turn away the traffic from the same to other streets; denies that it will be impossible for a wagon and team to remain on the Gratiot-street front of complainants' property while cars are being moved or may be standing on the same, and that it will not be safe to use said Gratiot street by teams or wagons, to the great, unascertainable, and irreparable damage to complainants' business.

9 Defendant further avers that it does not know and cannot set forth as to its belief or otherwise whether said wire mill company is one of the largest of the country and receives and ships a large amount of material and manufactured product which it is intended to be and will be shipped and carried over said railroad track operated by steam locomotives if said track be permitted to be laid and constructed. Defendant denies that not less than one hundred cars daily, on an average, with steam locomotives necessary to draw the same, are sought and threatened to be drawn over and upon the surface of said Gratiot street on said track, to the great wrong and injury of complainants and the public; denies that it is proposing to occupy said track by transporting cars containing coal and material and manufactured product over said road during business hours in the daytime, thereby causing and continuing between said hours a practically complete obstruction and closing of said street and a monopoly of said street by said railway company for the private use of said St. Louis Wire Mill Company, to the exclusion of the complainants and the public and to the great and irreparable damage of the public and of complainants.

Defendant denies that the noise, the smoke, the danger from fire, and from shaking and vibration of complainants' building, caused and occasioned by the passage of cars and locomotives within such proximity as aforesaid to complainants' premises, will render said premises less desirable and valuable as a place of business to complainants.

Denies that any damage is threatened to be done complainants by defendant, or that if any should be done that it would be irrep-

arable in its nature, and that complainants could not be fully compensated therefor in an action at law.

Defendant denies that it has collected and deposited the material for the construction of said track, and is about to commence the construction of the same for the private use of the said wire mill company and to the obstruction and monopoly of said street of said wire mill company and of defendant to such extent that said street cannot be occupied by your orator and the public, and that all said alleged actions, purposes and pretenses of defendant are contrary to equity and good conscience and tend to the manifest wrong and injury of complainants in the premises, and that the construction of said railroad track and the operation of the same will reduce the market value of the property of complainants and damage the same in a sum in excess of thirty thousand dollars or at all.

Defendant for further answer and defense avers that the railway which complainant alleges is about to be laid on said Gratiot street was already laid thereon by defendant before the filing of the bill of complaint herein; that said track was laid under — in pursuance and by authority of an ordinance of the city of St. Louis, numbered 13897, which is as follows:

"An ordinance granting permission and authority to the Missouri Pacific Railway Company to lay a side track from its main tracks as now laid in Gratiot street, west of Twenty-third street, eastwardly over and along Gratiot street, and over and across Twenty-third street, Twenty-second street and Twenty-first street, an alley in city block No. 2283, to the property of the St. Louis Wire Mill Company, situated in city block No. 2283.

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

SECTION 1. The Missouri Pacific Railway Company is hereby granted permission and authority to lay, maintain and operate a side track from its main tracks, as now laid across Gratiot street, at a point west of Twenty-third street, eastwardly over and along Gratiot street, over and across Twenty-third street, Twenty-second street and Twenty-first street an alley in city block No. 2283, to the property of the St. Louis Wire Mill Company, situated on city block No. 2283, provided, that the Missouri Pacific Railway Company shall not use the track herein provided to be laid, maintained and operated for any other purpose than that of transporting cars to and from the St. Louis Wire Mill Company's property, and to and from the property of any other person or company owning property on said Gratiot street and desiring such connection, and first having obtained power and authority from the municipal assembly by ordinance, to lay, maintain and operate a spur track from the side track herein provided, to the property designated in the ordinance to be passed, and, provided further that the Missouri Pacific Railway Company shall not at any time use the side track herein provided for, when the same is laid on said Gratiot street for the storage of loaded or empty cars.

SECTION 2. The said side track shall be laid under the supervision of the street commissioner; and the space between the rails and for two feet outside thereof, shall be kept in good repair by the said The Missouri Pacific Railway Company at its own cost and expense, with the same material as the adjoining street, and to the satisfaction of the street commissioner.

SECTION 3. The Missouri Pacific Railway Company before availing itself of the privileges granted by this ordinance, shall file its written acceptance of all the provisions of this ordinance with the city register, and shall at same time file its penal bond in the sum of five thousand dollars, to be approved by the mayor and city council, conditioned that the said company will save the city of St. Louis harmless from any and all damages that may arise from the construction, maintenance and operation of said track, and that the said company will at all times observe and carry out the provisions of this ordinance in each and every respect. Said bond shall be renewed from time to time, as the mayor of St. Louis may direct, and any failure to make such removal within a reasonable time when so ordered shall operate to forfeit all the rights and privileges granted by this ordinance.

SECTION 4. All other railroads shall have the right to connect their tracks with such switch, and use the same on reasonable terms and regulations, to be determined by the parties interested, and if they cannot agree upon the terms and the rules and regulations for that purpose, the same shall be determined by arbitrators, one to be appointed by each party, and if they cannot agree, the difference shall be determined by a third party to act as umpire. If either party shall refuse after ten days' notice to appoint his arbitrator, or the arbitrator of either party refuses to act, the other party may appoint both arbitrators. Provided, that any other railroad desiring connection for switch purposes to said track, shall first obtain power and authority to do so from the municipal assembly, by proper ordinance.

SECTION 5. The city of St. Louis reserves the right to repeal, alter or amend this ordinance at any time.

Approved Feb'y 18th, 1887."

That all the conditions of said ordinance have been fully complied with and all the requirements thereof met by defendant; that said track was lawfully laid, and is now being maintained and operated by defendant in virtue of the authority conferred by said ordinance.

All of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained;

12 and this defendant submits to this honorable court that the complainant has not on its bill shown any case in equity or case entitling them to proceed against defendant in this honorable court, and the defendant prays all such benefit as if it had demurred to the said bill.

THOS. J. PORTIS,
BENNETT PIKE,
Solicitors for Defendant.

And afterwards, to wit, on the eighth day of May, A. D. 1888, there was filed in said cause the exceptions and demurrer to amended answer in words and figures following, to wit:

Exceptions and Demurrer to Amended Answer.

United States Circuit Court, Eastern District of Missouri.

D. M. OSBORNE & Co., Complainant,
vs.
MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

The exceptions and demurrer of D. M. Osborne & Company, complainant, to the amended answer of The Missouri Pacific Railway Company, the above-named defendant.

This complainant, by protestation, not confessing any or all of the matters and things in the defendant's answer contained to be true in such manner and form as the same is therein set forth and alleged, doth except and demur to said answer, and for cause of exception and demurrer showeth that—

The alleged defence that the railway company, defendant, has already laid the track does not constitute a defence or a reason why the complainant should not have the relief asked for because it does not appear that the defendant has paid or secured to complainant any compensation for the injuries and damages resulting from such occupation of the street.

13 Because the ordinance of the city of St. Louis set forth in said answer as authority for the occupation of said street as a railway track does not constitute a valid defence for the reason that said ordinance is unlawful and in violation of the provision of the constitution of the State of Missouri, in that it permits or pretends to permit said railway company to occupy the street in the front of plaintiff's premises in the manner alleged without making any provision for any compensation.

And because said ordinance could not constitute a valid license or permission for the defendant to disturb the proprietary rights of the owner in the street adjoining his property until the compensation for the damage had been ascertained, as required by law, and paid to the owner.

Wherefore, and for divers other good causes of exception and demurrer appearing in the said bill, the complainant doth demur thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other replication to said answer and prays that a decree may be entered in favor of complainant, together with its costs and damages in this behalf most wrongfully sustained.

MILLS & FLITCRAFT,
Counsel for Complainant.

I hereby certify that I am solicitor and of counsel for the complainant in the above-entitled cause, and that, in my opinion, the

foregoing exceptions and demurrer of D. M. Osborne & Co., complainant, to the answer of The Missouri Railroad Company, the defendant, are well founded in point of law and proper to be filed in the above cause.

HENRY E. MILLS,
Solicitor and of Counsel for Complainant.

14 And afterwards, to wit, on the twenty-sixth day of May, A. D. 1888, the following further proceedings were had and appear of record in said cause, to wit:

Exceptions and Demurrer to Amended Answer Overruled.

D. M. OSBORNE & Co., Complainant,
vs.
MISSOURI PACIFIC R'Y Co., Defendant. } 2775.

Now come the parties, by their solicitors; and the demurrer and exceptions to the answer, heretofore submitted, having been considered by the court and the court being fully advised thereof, it is ordered that said demurrer and exceptions be, and the same are hereby, overruled.

And afterwards, to wit, on the ninth day of June, A. D. 1888, there was filed in said cause a replication in words and figures following, to wit:

Replication.

In the Circuit Court of the United States, Eastern District of Missouri, Eastern Division Thereof.

D. M. OSBORNE & Co., a Corporation, Complainants,
vs.
THE MISSOURI PACIFIC RAILROAD Co., Defendant. } In Equity.

The replication of D. M. Osborne & Co., a corporation, the above-named complainants, to the answer of The Missouri Pacific Railroad Co., defendant.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantage of exception which may be had and taken to the manifold insufficiencies
15 of the said answer, for replication thereto says that it will aver, maintain, and prove its bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready to aver, maintain, and prove as this honorable court

shall direct, and humbly prays as in and by its said bill it hath already prayed.

MILLS & FLITCRAFT,
Solicitors for Complainant.

16 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

D. M. OSBORNE & Co., Plaintiff,
vs.
MISSOURI PACIFIC RAILWAY Co., Defendant. } No. —.

Be it remembered that on the 31st day of January, 1889, the above-entitled cause came on for trial before his honor Judge Thayer in said court, Messrs. Mills & Flitcraft appearing for the plaintiff, and T. J. Portis, Esq., and Bennett Pike, Esq., appearing for the defendant, and the following proceedings were had:

Plaintiff, to sustain the issues on its part, offered evidence as follows:

Plaintiff's counsel first offered in evidence the articles of incorporation of the plaintiff, and same *was* marked Exhibit A.

DAVID F. KAIME, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. In what business are you engaged?

A. Real estate.

Q. How long have you been engaged in that business in the city of St. Louis?

A. Since the 1st of April, 1864; about 25 years, nearly that.

Q. Have you been extensively engaged in buying and selling real estate in all parts of the city of St. Louis?

A. I hardly know whether you call it extensively or not. We have bought and sold all we could.

Q. Are you familiar with the values of real estate in the city of St. Louis?

Mr. Pike, of defendant's counsel, objected to the question as immaterial and incompetent.

17 The COURT: We might as well understand one another before we go on with the testimony in this case. You have filed a bill here, Mr. Mills, for an injunction to prevent the railroad from operating this track on the ground that it was unlawfully laid before the damages which the defendant sustained were ascertained and paid. The question, as I understand, is upon your right to an injunction, upon your right to that relief.

Mr. MILLS: As to the question of time when the track was laid——

The COURT: That is a different matter; you are going into the value of property now.

Mr. MILLS: We have substantially stipulated, your honor, to the effect that the track was laid some 10 days after this bill was filed

and served. When that question was argued before your honor the answer contained the allegation that the track was laid before the bill was filed and served. We have now a stipulation to the effect that the track was laid on the 20th of March, and the bill was filed and served on February 16th, so that that question is not in this case now. We are in this position: This bill was filed for an injunction——

The COURT: I understood your associate counsel, when he asked me to set this case for hearing, to set it down for hearing the testimony on that issue of fact, whether or not the track was in fact laid before or after this bill was filed.

Mr. MILLS: That is entirely out of the case now.

The COURT: Originally you filed a bill for an injunction against the defendant for putting down a track on a given street before the damages to the abutting property were ascertained. To that bill the defendant filed an answer, and, among other things, they pleaded that they laid the track by virtue of city ordinance, and they further plead that they laid the track under that ordinance before
18 your bill was filed. I held that if that was so that you had no right of equitable relief, that your remedy was at law for damages. To that answer I understood you interposed a reply and now you say that that issue of fact is taken out of the case by stipulation. Now, what do you want to *be* try?

Mr. MILLS: The track was laid, your honor, on March 20th, and the question is now whether or not the court, in its equity power, will enjoin the defendant from using that track, for the reason that it was improperly laid, laid without authority of law, laid when they had notice that we objected to it and when they had been served with an injunction to prevent them from entering there.

Mr. PORTIS: Not with an injunction.

Mr. MILLS: With this bill asking for an injunction.

The COURT: That issue of fact is now out of the case, I understand. It has been stipulated between you that this track was, in point of fact, laid 10 days after the bill was filed.

Mr. FLITCRAFT: Yes, your honor; more than thirty days.

The COURT: That issue of fact, then, is out of the case. Now, the question arises, What are we to try in this case? If, assuming that your view of the case is correct, there were damages inflicted here by the laying of the track that are within the constitution of the State—such damages as the defendant is bound to pay—then it becomes a very doubtful question whether, in a proceeding of this kind, the court can itself ascertain those damages and direct that they be paid.

Mr. MILLS: We are not asking that in this proceeding.

The COURT: I say that is a doubtful question. I am not going to hear evidence as to what those damages were. If I come to the conclusion that it is competent for me to ascertain what those damages are and to direct the defendant to pay them as a condi-
19 tion of further operating its road, I shall refer the question as to the amount of those damages to some commissioner, whom I may appoint for that purpose. The first question to be de-

termined in this case and the only question that I shall now try is the question whether the plaintiff, by reason of the laying of that track, has sustained such a damage as is within the contemplation of the State constitution, which provides that property shall not be taken or damages without compensation. When I have determined that fact, if it is settled in your favor that such damages have been sustained, it will be necessary for me to consider whether I will in this proceeding ascertain those damages and direct or decree the defendant to pay them as a condition of operating this track in the future. Of course they have the right to operate the track if the damages are paid. There is no dispute about that; but if it be true that such action can be taken in this case, I shall refer the particular matter of the assessment of the damages sustained to a commissioner. That would be the proper way, in my judgment, to ascertain what those damages were. Therefore I think for the present you should confine yourself to the production of such proof as you may think necessary for the purpose of showing that you have, as alleged in the bill, sustained a damage that is within the protection of the constitution of the State and there rest your case.

Mr. MILLS: That is all I desire to do—simply to show the character of the damage was such that your honor would consider it to be under the constitution and not show the amount of the damage.

The COURT: I must determine that by knowing the surroundings, the width of this street, how it is used, the geography of the locality, and how the operation of that track affects the business of your client. I have nothing to do now with the value of the property.

Mr. MILLS: I understand, your honor, and in order to determine whether the market value of the property has been depreciated by putting the track on the street we propose to show by Mr. Kaime that he has examined the property and is familiar with it.

The COURT: Let me know in the first place the location of the track, the surroundings, what kind of business is carried on there, and how the track affects the carrying on of the business.

Mr. MILLS: Then we can withdrawn Mr. Kaime for the present.

FRANK W. TERPENING, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. What is your business?
A. The sale of agricultural implements.
Q. Whom do you represent?
A. D. M. Osborne & Co., of New York.
Q. How long have you been representing them in the city of St. Louis?
A. For about 18 months.
Q. Where is their place?
A. Northwest corner of 22nd and Gratiot street.
Q. Please look at this map and state whether it correctly sets

forth the situation of the property in question (handing same (Exhibit B) to witness).

A. It does.

Q. Please state how much of that property is covered by buildings—how many feet front there are on Gratiot street.

By the COURT:

Q. Your property is on the northwest corner of 22nd and Gratiot streets?

A. Yes, sir.

Q. And fronts south?

A. Fronts south.

Q. It has a front of 86 feet?

21 Mr. MILLS: 86 feet, which is occupied by the building.

The COURT: The building is 85 feet and 6 inches, and there is a frame shed of 12 feet and 6 inches, according to this plat.

Mr. PORTIS: It is 136 feet long on 22nd street.

By Mr. MILLS:

Q. How many stories high is that building?

A. Four stories and a basement.

Q. Of what is it constructed?

A. Brick and stone.

Q. Do you know when that building was erected?

A. I believe in 1884.

Q. For what particular purpose was it erected?

A. For the storage and sale of agricultural implements.

Q. What agricultural implements do D. M. Osborne & Co. manufacture?

A. Mowers, self-binders, and reapers.

Q. You handle other machinery besides that of your own, do you not?

A. Nothing except a harrow, which is made at the same place our goods are manufactured—at the same town.

Q. In what manner is the property west on Gratiot street occupied?

A. There is nothing there now at present except some old tenement houses and a wagon shed.

Q. State, if you know, whether or not that property was purchased for the purpose of putting up another building adjoining.

Defendant's counsel objected to the question as incompetent. The court overruled the objection.

A. The unoccupied property adjoining our building on the west was purchased with the intention of putting up a building similar to the one on the property adjoining on the east.

Q. Do you occupy the one-story frame shanty that is on the rear of that vacant property?

A. That is simply for unloading purposes in connection with the warehouse; simply a platform with a roof on it.

22 Q. How wide is Gratiot street from curb to curb?

A. My recollection is it is about twenty-five feet; something about that.

Q. Where is this railroad track laid; in what portion of the street?

A. In the center of the street.

By the COURT:

Q. Gratiot street is south of the railroad track?

A. Of the Missouri Pacific; yes, sir.

By Mr. MILLS:

Q. In the rear of your property are there any railroad tracks?

A. Yes, sir.

Q. The tracks of the defendant?

A. Yes, sir.

Q. How wide a track is this in the middle of Gratiot street?

A. It is of the standard gauge of tracks.

Q. Four feet eight and a half inches?

A. I think that is the measurement of a standard-gauge track.

By the COURT:

Q. Is the main track of the Missouri Pacific and the Wabash in the rear of your property?

A. North of our building.

Q. And the track you refer to as being on the south is the one running through the street?

A. Yes, sir; through Gratiot street.

By Mr. MILLS:

Q. How far does the track on Gratiot street extend west of your premises?

A. It continues west on Gratiot street until it strikes the main tracks of the Missouri Pacific.

Q. About what street does it strike the track?

A. I should say very near to 23rd street.

Q. Does the track run straight through the center of Gratiot street during its whole course from 22nd street to 23rd street?

A. It does not.

Q. Which way does it diverge?

A. It diverges to the north.

23 Q. Then is it any nearer the curb on the west front of your property or the west corner of the unimproved property than it is at the corner of 22nd and Gratiot street?

A. It is.

Q. Is the Gratiot-street front of your building, the four-story brick, used or adapted for the purpose of receiving and shipping freight?

A. It is.

Q. Do you receive and ship any freight in wagons from your establishment?

A. We do.

Q. I will ask you whether in respect to all lots less than car-load lots you are not compelled to dray them from your factory to the various railroad stations.

A. We are.

Q. Do you have any trade or traffic with men coming from the country who receive the goods at your door and transport them themselves?

A. Yes, sir.

Q. Who are those people; what is their character? I will ask you whether or not they are farmers and men from the country or not.

A. The majority of them are farmers and agricultural-implement dealers who come from the country to take their stock out.

Q. What room is there for a wagon or wagons between the curb in front of your building and the railroad track?

A. There is not sufficient room for a farmer's wagon to back up to receive goods.

Q. State whether or not farmers and others have declined or refused to come to your establishment for goods on that account.

Mr. Pike, of counsel for the defendant, objected to the question as incompetent.

The COURT: You can state that if you can state who the person was.

The WITNESS: Well, I cannot mention names at present. I know that we have had people come there, but I cannot speak their
24 names because we have a great many people come there in the summer to receive goods.

The COURT: Of course you cannot answer a question of that kind by rumor—what somebody may have told you. If any person within your knowledge refused to come there on that account, you can state it.

The WITNESS: I do know the fact to be that persons have come there to receive goods—farmers—who would not receive their goods on account of the track being in front of the building. They would not drive their teams there.

By Mr. MILLS:

Q. State, with reference to your own teams, what obstruction, if any, you have experienced in shipping and receiving freight from the Gratiot-street front of the building.

A. We have had to abandon that as a loading place in our building on account of the tracks being there, for the reason that there is not sufficient room for a team to back up to receive or unload goods.

Q. How wide is the ordinary dray wagon or truck from hub to hub?

A. About five feet.

Q. Can those wagons be used to advantage having them broadside to the street, or must they be used with the end to the pavement?

A. To load conveniently the end must be towards the building. You cannot use them broadside.

Q. Well, with the end to the building and the wagon and horses in front projecting out into the street, is there room enough for a dray with horses and for wagons to stand there without the horses being on the railroad track?

A. There is not.

Q. How often do the trains run upon that street?

A. Well, there is no regular schedule for the running of trains. We never know when a train is coming down there. No time is set for their trains to pass. They come and go as they please—
25 sometimes two or three times and four times a day.

Q. You say you have been compelled to abandon that front of the building?

A. Yes, sir; for loading and receiving freight.

By the COURT:

Q. How frequently, on an average, does a train move along that track in the daytime?

A. I should say they would average three times a day—three trips a day.

By Mr. MILLS:

Q. Each way?

A. Yes, sir; making six times.

Q. How much of an interval is there between the trips when they start down to the wire mill and when they come back?

A. They may be gone five, ten, or fifteen minutes; you never can tell.

Q. Do they ever go oftener than that? You speak about their averaging two or three or more times a day.

A. I should say that they would come oftener than that, but not regularly.

Q. Now, in reference to this building, where are the openings or doors—I mean the office door and the shipping doors?

A. The entrance is on Gratiot street.

Q. Are the offices on Gratiot street?

A. The offices are on the corner. A portion are on 22nd street and a portion on Gratiot street.

Q. But they front on Gratiot street?

A. That is, the front of our building and the offices are on Gratiot street.

Q. I will ask you whether or not the only entrance to the office is on Gratiot street.

A. It is.

Q. And the openings or doors for the purpose of shipping freight; how many of those are on Gratiot street?

A. We have one large entrance on Gratiot street for receiving and unloading freight.

Q. Now, in reference to the time when these trains go by,
26 have you noticed any inconvenience from smoke or dust?

Mr. Pike, of counsel for the defendant, objected to the question as incompetent and immaterial.

The COURT: I will let him answer that question, reserving my ruling on the competency of that.

The WITNESS: We have. We are subject to inconvenience on account of the passing of the locomotives and the dust and smoke from the engine. We often have our windows open and the smoke comes in there in great clouds and deposits soot on our books. Sometimes it is some time before the office is ventilated sufficiently for us to go on with our business.

By Mr. MILLS:

Q. Is that more noticeable in summer than at other times?

A. It is for the reason that the windows are all open at that time.

Q. Have you noticed any inconvenience from the vibration or jarring or shaking of the building?

Mr. Pike, of counsel for the defendant, objected to the question as incompetent. The court received the testimony, subject to the objection.

A. There is considerable jarring to the building as trains pass by. It depends largely on the speed. Often they go through quite rapidly and at other times not so fast. We notice considerable jarring to the building when the trains are passing there.

By the COURT:

Q. Do you deliver goods at the rear end of your building immediately into the cars of the Missouri Pacific or any of these railroads, the north end?

A. Only in car-load lots.

Q. Your property abuts up against the right of way of that road in the rear?

27 A. Yes, sir; but our track is on our own property. Our switch on which we load those cars is on our own property.

By Mr. MILLS:

Q. You say the switch next to the rear of your building is your own switch?

A. Yes, sir.

Q. But the other tracks are the tracks of the Missouri Pacific railway?

A. They are.

Q. Can you ship car-load lots on any other road than the Missouri Pacific—I mean by the use of your switch in the rear?

A. Yes, sir.

Q. But all broken lots, I understand, you have to send to other roads by truck?

A. We do to all roads entering St. Louis.

Q. Now, in reference to the vacant or unimproved portion of the

property, state whether or not the intention of improving that property has been abandoned.

Mr. Pike, of defendant's counsel, objected to the question as immaterial. Objection sustained.

Q. I will ask you whether or not the condition of that vacant property, as to its being adapted to improvements, has been changed by the construction of this track in the street in front of it.

A. It has.

Mr. Pike, of counsel for the defendant, objected to the question.

Q. Whether or not it is any longer desirable for improvement—whether it can be used.

The COURT: I think that is a conclusion that the court can form just as well as the witness; that calls for a conclusion which the court can draw.

By Mr. MILLS:

Q. Suppose a building should be constructed on that vacant property, how far would the north corner of the building be
28 from the track—I mean the southwest corner?

A. Well, there would only be the space from the curb to the building.

Q. Does the track cut the curb at that corner?

A. It very nearly strikes the curb if it does not strike the curb at that corner.

Q. Could any wagon be placed in front of a building erected on that vacant lot at the southwest corner of it?

A. It could not.

Q. That portion of the street, then, in front of that corner is entirely occupied by the railroad, beginning with the curb and going out as far as the railroad extends?

Defendant's counsel objected to the question as incompetent. Objection sustained.

Q. This vacant lot is bounded by what property on the north?

A. The Missouri Pacific track.

Q. On the west?

A. By the Missouri Pacific offices.

Q. This two-story brick that is put down there, is that on the Missouri Pacific property—the railroad property?

A. On the west it is.

Q. On the south how is that vacant lot bounded?

A. By Gratiot street.

By the COURT:

Q. That is, you say this triangle in here is the property of the Missouri Pacific railway?

A. I say there is a building on the west of the Missouri Pacific railway, in which their offices are.

Mr. FLITCRAFT: If your honor please, that plat does not show the building. This shows the building.

By the COURT:

Q. That triangular piece of ground included between this switch and the main track, is that of the Missouri Pacific?

29 A. I do not know as to the whole of it being the Missouri Pacific, but their offices immediately adjoin our western border.

Q. Occupied as such?

A. Yes, sir; occupied by the superintendent.

By Mr. MILLS:

Q. Since you have been manager I will ask you whether or not there has been any public travel on Gratiot street between 22nd and 23rd—any general public travel.

A. I have not noticed any. I do not know of any except people who are compelled to go there.

Q. You were not there before this track was constructed?

A. I was not then living in St. Louis, but I had been there previous to the construction of the track.

Q. Do you know how it was previous to the construction of the track?

A. I frequently saw teams pass there.

Q. It was adapted for their passing?

A. Yes, sir.

By the COURT:

Q. Is that street improved, macadamized, or is it merely a dirt road?

A. It is a dirt road.

Q. Any sidewalk laid?

A. Yes, sir.

Q. Curbstones set?

A. Yes, sir.

By Mr. MILLS:

Q. It is curbed and guttered, is it not?

A. Yes, sir.

Q. Where does this switch or track lead to—to what establishment?

A. To the St. Louis Wire Mill factory.

Q. On what street is that?

A. On the corner of 21st and Gratiot street-, southeast corner.

Q. Is that track used by any other firm or establishment than the St. Louis Wire Mill Company?

A. It is not.

Q. Can you state how many cars a day are transferred over that track—about?

30 A. I could not give definitely the number. They often go up there with empty cars and leave them in with the St.

Louis Wire Mill Company for several days and then come back with an engine alone. They leave the cars; sometimes three or four or five cars and sometimes more.

Q. Do you know whether the coal for the use of the wire mill company is transported over that track?

A. I don't recollect having seen any coal in open cars. It may have been in closed cars and passed on the track.

Q. How large an establishment is the wire mill company—how much ground does it occupy?

A. I have no knowledge as to the dimensions of their building. I should say it had a frontage on Gratiot street of about 75 feet. I don't know the dimensions in the rear.

By the COURT:

Q. It also fronts on 21st street?

A. Yes, sir; the corner.

Q. The Tayon-avenue bridge is east of you and the Jefferson-avenue bridge is west of you?

A. The Jefferson-avenue bridge is west of us. I did not understand the name of the other.

Q. The Tayon-avenue bridge?

A. Is that 18th street?

Q. Yes.

A. Yes, sir; that is east.

Cross-examination by Mr. PIKE:

Q. Your building has 80 feet front?

A. 86 feet and a fraction on Gratiot street.

Q. And it is a four-story building?

A. Four stories and a basement.

Q. It runs back to the Missouri Pacific main track 136 feet or near that?

A. The vacant property—the lot runs back.

Q. How far does the building run back?

A. About 122 feet, I think, or 120 feet.

Q. Then there is 122 feet of the building fronting on 22nd street?

A. Yes, sir.

31 Q. Have you any entrance on 22nd street?

A. Yes, sir.

Q. What is that?

A. No entrance to the building on 22nd street.

Q. Have you no door there?

A. Yes, sir; we have a door.

Q. Leading into the building from 22nd street?

A. Yes, sir; we have a door.

Q. More than one?

A. Yes, sir.

Q. Don't you have a door from which you could load or unload—that you could unload from on 22nd street and take goods into the building?

A. We have been forced to do that.

Q. I say you can do it. There is a door or opening through which you can take goods?

A. Yes, sir.

Q. And you have 122½ feet on 22nd street?

A. Somewheres about that.

Q. What prevents you when you sell goods in wagon lots to farmers from taking your goods out of the front and loading them on 22nd street?

A. For the reason that the farmer is hemmed in between two railroad tracks.

Q. There is nothing to prevent you from doing it, is there?

A. There would be nothing to prevent us from doing it if we could get the farmer to go in there.

Q. There are no railroad tracks on 22nd street for 150 feet?

A. No tracks on 22nd street from Gratiot street to the railroad.

Q. No tracks on 22nd street, and there is a portion of that street from this track that runs along Gratiot street to the Missouri Pacific track on 22nd street on which there are no tracks at all?

A. No tracks.

Q. Your place for loading car-load lots for transportation is in the rear of your premises?

A. On the north; yes, sir.

Q. How far is the rear of your lot from the Missouri Pacific tracks?

A. About twelve or fifteen feet, I should think.

32 Q. Then you have a switch running out from the Missouri Pacific track into your own property?

A. We have.

Q. That runs to the back part of your building?

A. Yes, sir.

Q. And you load everything that is transported by the railroad from that end of the building, from the rear end of the building?

A. Only the car-load lots.

Q. Suppose you want to send half a car-load, wouldn't you do it from that end?

A. No, sir.

Q. Why?

A. Because the railroad company don't receive in less than car-load lots.

Q. Then in car-load lots they are all loaded from that end of the building?

A. Yes, sir.

Q. Could you unload for farmers on that side?

A. We could not.

Q. Why not?

A. Because there is no passage-way there.

Q. Passage-way—what do you mean by that?

A. There is no driveway for teams.

Q. Isn't your switch made level with the ground there?

A. Yes, sir.

Q. Is there anything to prevent a farmer from driving on your switch track?

A. There would be nothing, provided we could get the farmer to go on.

Q. I am not asking about that. I asked you whether there is anything to prevent a farmer from driving his horse and wagon in there and receiving agricultural implements and driving out again.

A. Yes, sir.

Q. What is it?

A. There is no roadway there, no entrance; you are immediately on the Missouri Pacific railway track; they adjoin our building.

Q. You told me the Missouri Pacific railway's tracks were about 15 feet from the rear of your building. What prevents a
33 farmer from driving on your ground into the rear of the building?

A. There is no provision there for driving in teams.

Q. Is there anything to prevent it?

A. Yes, sir; for the reason that the ground is not on a level with the street.

Q. Is it higher or lower?

A. Lower.

Q. How much?

A. I should say three feet.

Q. It would cost but very little to make a roadway?

A. I don't know what the cost would be.

Q. You would only have to fill up three feet to make a good roadway?

A. You would have to fill up the entire length of our property.

Q. And you would have a roadway when you did that. Now, then, you say there is no reason why you cannot deliver at the 22nd-street entrance except that the farmer is hemmed in there. Is that it?

A. That is not the front of our building.

Q. I am not asking you that. You need not argue the case; answer the question. There is nothing to prevent your delivering your goods at the 22nd-street entrance—agricultural implements can be taken out of that large door and delivered to the farmer?

A. They could if the tracks were not so close at hand.

Q. There are no tracks on 22nd street, and the farmer could come in with his wagon, and all he would have to do would be to drive out of 22nd street and cross this track?

A. That is a question about his being able to drive out there, because the street is occupied with the Missouri Pacific tracks north and south.

Q. He need not cross the north track?

A. Either north or south.

Q. He could do either one or the other?

A. He could.

Q. If he went out south all he would have to do would be to

cross the switch track. You say the farmers are such peculiar
34 characters that you cannot get them to cross that track and unload or load implements into their wagons?

A. I do.

Q. You can't get them to do it?

A. We cannot.

Q. Did you ever know one that refused to do it?

A. I have.

Q. Can you call his name?

A. I cannot.

Q. How long ago was it?

A. This past season.

Q. Where does he live?

A. In St. Louis county.

Q. He refused to drive in there on 22nd street and receive agricultural implements from that side of the building. What reason did he give?

A. For the reason that he was afraid to go in there with his team.

Q. What was he afraid of?

A. The railroad track, the engines and cars.

Q. He was not afraid of the tracks, was he?

A. The cars and engines on the tracks.

Q. He was afraid when he attempted to drive out and across Gratiot street that he would be struck by an engine or the cars?

A. He was afraid his team would be frightened by the continual passing of the engine.

Q. He would be as likely to be frightened by cars on your track as well as the Gratiot-street track?

A. No, sir; because our tracks do not extend over 22nd street.

Q. Wouldn't his team be as likely to be frightened by the cars on the main track?

A. Yes, sir.

Q. You don't hold the Missouri Pacific railway responsible for that?

A. On the main track we do not.

Q. How far is that from the main entrance?

A. I should say in the neighborhood of twenty-five feet.

Q. How far is that entrance from the Gratiot-street track—100 feet?

A. In that neighborhood.

Q. How many entrances have you got on 22nd street—
35 more than one?

A. We have two entrances on 22nd street.

Q. What do you have those entrances for—what do you use them for?

A. Anything that comes to our building.

Q. To take material in there and out?

A. We do now that we have abandoned the Gratiot-street entrance.

Q. Let me ask you about this track in front of you. Do you

think there are more than four or five cars taken out from that wire mill or into it a day?

A. There is no set number. As I said before, we never know when they are going or coming.

Q. You have not answered my question. I asked you if you knew how many were put into the wire mill and how many were taken out in a day.

A. On an average?

Q. On an average; yes.

A. Two or three cars a day—possibly more.

Q. I will get you to state if that track is not used always, or nearly always, from nine o'clock to eleven o'clock in the morning, and at no other time.

A. No, sir.

Q. That is not true?

A. It is not.

Q. Is it not generally the fact that the tracks are used only about two hours in the morning?

A. There is no regular time for them coming there.

Q. There is no necessity of their going in there at all times of the day, is there?

A. I don't know as to that.

Q. There are about three cars a day, you say? Now, that switch, I understand you to say, is used entirely by the wire company?

A. Yes, sir.

Q. No other cars go in there except cars put into the wire company or taken out from the wire company?

A. I have never seen any other cars go in there, except I have seen the Missouri Pacific back cars in there on account of
36 some accident on their own track.

Q. They do not store cars there?

A. Not regularly.

Q. Did you ever see them on there except as a matter of necessity and very rarely at that?

A. I have seen them on there. I do not know whether it was a matter of necessity or not.

Q. I understood you to say they did not stay there more than eight or ten minutes; just go into the wire mill and come out; that they do not stay there any length of time?

A. No, sir.

Q. The cars put into the wire mill are put in on that portion of the switch that is on the ground of the wire mill, are they not, inside of their works?

A. Not always.

Q. Generally?

A. I do not know as to that.

Q. They do not run them out in the middle of the street?

A. I have seen cars standing in front, in the street.

Q. In the middle of the street or inside of their works?

A. I have seen them load them in the street.

Q. How often and when?

A. I could not exactly recall the exact date, but I remember of seeing them loading cars in the street.

Q. How far is that from your place?

A. One block.

Q. You are on the northwest and they are on the southeast?

A. One block away.

Q. The track is in good condition there, level with the ground?

A. Not entirely so.

Q. Do you say that that track is not level and smooth with the ground there?

A. I do.

Q. So the public is prevented from using it properly?

The COURT: I do not see as that is material in this case.

By Mr. PIKE:

Q. Do you have a team of your own, a delivering team?

A. Yes, sir.

37 Q. Connected with your establishment?

A. We do not own any teams ourselves, but we employ a teamster.

Q. Whenever you have wagon lots or broken lots you hire a dray or something of that kind?

A. We employ a drayman who works for us during the year. He does nothing but to attend to our business when we have business for him.

Q. But you do not own the team. He owns the team?

A. He does.

Q. I understood you to say that you got all of your goods from the East by car-load lots?

A. We frequently have cars consigned to East St. Louis.

Q. No, no; I am not asking you about that. I say at your building there you receive all your agricultural implements in car-load lots; you receive them at the rear of your building from your own switch?

A. No; not all of them.

Q. Where do you get any of the others from—what track?

A. We often dray our goods from East St. Louis. Our cars are consigned to East St. Louis.

Q. Whenever they are brought over by cars they are delivered in the rear of your building?

A. Yes, sir.

Redirect examination by Mr. MILLS:

Q. Is the ground level between Gratiot street and the main tracks of the Missouri Pacific to the rear of your premises?

Mr. Pike, of counsel for the defendant, objected to the question as incompetent. Objection overruled.

A. I do not understand the question.

Q. Is the ground level between Gratiot street and the tracks of the Missouri Pacific, in the rear of your premises, or is there an incline, a fall?

A. There is.

Q. How much of a fall is there from your corner—from
38 the corner of 22nd and Gratiot street—to the rear of your building?

A. About three feet.

Q. I will ask you whether the doors that were originally made on 22nd street were made on a level with the pavement.

Mr. Pike, of counsel for the defendant, objected to the question as immaterial and incompetent. Objection overruled.

A. No, sir.

Q. Are they as well adapted for receiving and shipping purposes as those on the front?

A. They are not, for the reason——

The COURT: Suppose you let him tell how much the bottom of them is above the pavement.

By Mr. MILLS:

Q. Please state how high the sill of the door, the bottom of the door, is above the pavement.

A. I should say about three feet.

By the COURT:

Q. Are they constructed that way for any particular reason, or was that due to the fact that there was a decline of the ground to the north and the doors were made level with the floor?

A. All the doors, the entrances to the building, are on a level with the floor.

Q. The fact that they are above the pavement is due, I suppose, to the decline of the ground from the building?

A. We have the basement in the building, which necessarily makes the doors higher, for the reason that we get the better height in the basement.

By Mr. MILLS:

Q. In reference to the driveway in the rear that Mr. Pike spoke about, you stated that there was no driveway but your
39 switch. Would there be room for a wagon if it should drive in on your switch in the rear of your building to turn around and get back the same way?

A. No, sir.

Q. And you say that those tracks in the rear and the switch are three feet lower than the level of 22nd street?

A. Yes, sir.

Q. I will ask you whether, in the conduct of your business, there may not be several teams at one time at your establishment engaged in the business of receiving and discharging freight.

A. Yes, sir; there are several teams at a time there in many cases.

Defendant's counsel objected to this testimony as incompetent.

Q. Those used by yourself and those by customers coming?

A. Yes, sir.

Q. When you speak about two or three cars, I will ask you how many trains a day or how many times a locomotive goes by with a car or cars on the Gratiot-street front to the wire mill and back.

A. On an average, two or three times a day. I have seen them go by there without any cars both ways.

Q. In reference to the amount of goods received at your establishment, in reference to goods that are returned or goods in small lots that are sent to your establishment, I will ask you whether or not those come in car-load lots or whether they are drayed to your establishment.

A. Nearly always in less than car-load lots, and they are drayed.

By Mr. PIKE:

Q. What is the distance from the door on Gratiot street to the ground, how much higher is the door?

A. To the ground or to the pavement?

Q. Well, the ground; take it from the ground first, how much higher is the door than the ground?

A. The sidewalk or street?

Q. Well, the sidewalk.

A. About three feet, I should say.

40 Q. It is the same on 22nd street?

A. Yes, sir. Did you speak first of Gratiot street?

The COURT: Yes; he asked you about Gratiot street.

The WITNESS: I think the distance on Gratiot street would be about 2½ feet.

By Mr. PIKE:

Q. The floor of the building is the same height above 22nd street that it is on Gratiot street?

A. Very nearly. I should say there would be about six inches difference.

The COURT: Now, Mr. Mills, as I am taking this testimony as a commissioner really, you having some experts present, I will allow you to show by your experts the general fact whether the laying of this track in Gratiot street enhances or depreciates the market value of the property, without going into the question of amount, and reserving the question for future decision, if it does depreciate it, whether that makes such damage as is recoverable.

F. W. DRURY, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. In what business are you engaged?

The COURT: You can run over this proof as to the location and

surrounding distances very rapidly. I presume I understand it from the testimony given by the last witness about as well as if I sat here all day.

The WITNESS: I am engaged in the harvesting-machine business.

By Mr. MILLS:

Q. What concern?

A. The Walter A. Wood Mowing & Reaping Machine Company.

41 Q. Where is your place of business?

A. On the corner of 21st and Randolph street, within 25 feet of the corner. We are really on Randolph street.

Q. Are you familiar with the premises of D. M. Osborne & Co. on 22nd and Gratiot street?

A. Somewhat.

Q. Where you familiar with those premises before the buildings were erected?

A. No, sir.

By the COURT:

Q. Are you north or south of Gratiot street?

A. North of Gratiot street—this side of the Missouri Pacific tracks.

By Mr. MILLS:

Q. Your concern manufactures and distributes harvesting machines?

A. Yes, sir.

Q. You simply have the distribution of the machinery at this place—the factory is in the East?

A. The factory is in the East.

Q. Were you familiar with these premises before this track was constructed on Gratiot street?

A. Well, not what you might say familiar. I have been there.

Q. You have seen the premises before the track was constructed on Gratiot street?

A. I know where the premises are. I have been in the building. I have been in front once or twice.

Q. I will ask you whether that building was adapted for the business of handling agricultural machinery.

A. Yes, sir; it was.

Q. Constructed for that purpose?

A. Constructed for that purpose, as I understand.

Q. How long have you been engaged in the business of handling agricultural machinery?

A. Twenty-four years.

Q. I will ask you whether or not the construction of that track on Gratiot street has had any effect on the value of that building or the capacity of that building for use for the purpose for

42 which it was built.

A. I cannot say from my own knowledge.

Mr. PIKE: I do not think he has shown himself to be an expert for that, your honor.

The COURT: How long have you been doing business in that locality?

The WITNESS: Since August, 1887.

By Mr. MILLS:

Q. But you have been engaged in that character of business for 24 years past?

A. Yes, sir; in our present location only since August, 1887—a little over a year ago.

The COURT: I will take his opinion as to the effect the laying of that track in Gratiot street may have had, if any, upon the market value of that property.

Mr. PIKE: I do not object to that if he has shown himself to be a real-estate man or able to speak of it.

The COURT: He has lived in that locality, and I will take his opinion on that point.

Mr. PIKE: He has not stated he is acquainted with the value of real estate in that neighborhood.

The COURT: Go on.

The WITNESS: I should say it had the effect of depreciating the value of the property.

By Mr. MILLS:

Q. In what way? Please explain that to the court.

A. Because the track in front of the building would necessarily make it more inconvenient for handling goods in and out of it, and there are other objections to having a track in front of your building. I understand their business is similar to ours; that they have to ship a great many goods, machines, &c., from their build-
43 ing in drays and to deliver them on wagons, and it would be inconvenient for a dray to get in there or for a farmer's wagon, and therefore it would be a great objection, a great inconvenience, to transacting business in such a building. In my case I should consider I was damaged.

Q. What effect, if any, would it have on the vacant property adjoining?

A. I should say it would have the effect of deterring anybody from purchasing it for a similar purpose.

Defendant's counsel objected to this testimony as incompetent.

Q. Did you purchase the property that you now occupy?

A. Yes, sir.

Q. In the course of making that purchase did you examine the property up and down the valley that was adapted for track purposes?

A. Yes, sir; made a through investigation.

Q. Did you familiarize yourself more or less with the value of those properties that were on the track?

A. Yes, sir.

Q. What is that property adapted for—the vacant property?

A. It would be a good locality for a warehouse similar to the one we are occupying and similar to the one that D. M. Osborne & Co. are occupying.

Q. But would it be desirable to have a track on Gratiot street in front of it?

A. Not as desirable as it would be with the track away from there, for the reasons that I have given before.

Q. Have you any experience with farmers—people from the country—coming in after agricultural machinery?

Mr. Pike, of counsel for the defendant, objected to the question as being too remote.

The COURT: Mr. Mills, do you suppose to go into general objections as to farmers——

44 Mr. MILLS: People dealing in machinery, agricultural machinery, whether or not they would be prevented from going to a place that was obstructed by a track of that character.

The COURT: I will sustain the objection. I will let you show specific instances if any man has declined to go there, and that only, in reference to the property.

Mr. MILLS: If I understand, your honor does not consider at this time that we should ask an expert as to the difference in value.

The COURT: Nothing about the amount. The only question is to the effect whether it has depreciated it or enhanced it.

Cross-examination by Mr. PIKE:

Q. I understood you to say that the fact that that Gratiot-street track was in front of that property, leaving a space of about eight feet, the effect of it was to depreciate the value of the property?

A. It would for purposes of that kind if I were going to purchase it.

Q. For manufacturing purposes?

A. For storage; that is different from manufacturing.

Q. It would not affect it for manufacturing purposes?

A. I should say the objection would not be so serious as to any manufacturing business or a similiar business.

Q. You think for the agricultural business or business of storage of something of that kind it would depreciate the value of the property?

A. Yes, sir.

Q. Supposing there was no switch in the rear of that peoperty, then what would be the effect of a track there on Gratiot street on the value of the property, wouldn't it enhance it, if there was no track in the rear from which they could load or unload from

45 cars. Wouldn't the fact of laying that track there in that street enhance the value of property for this sort of business?

A. Not unless the switch was a private one and owned by the man who owned the building.

Q. What difference would that make?

A. Then they could have control of it.

Q. Suppose anybody would have the right to use this switch; let us assume it was a public switch, what effect would that have then?

A. I would say it was a very serious objection to it and depreciated the value.

Q. If there was no other way of getting into that property except in front—that is, by cars—wouldn't that track enhance the value of the property for this sort of business or any other kind of business?

A. I hardly think it would.

Q. They could not get in there with cars, I am assuming. Wouldn't it improve the value of the property to have it provided with a railroad track?

A. If I were going to buy the property——

Q. I am not asking you if you were going to buy the property, I am asking you whether, if there was no track in the rear and that track was in front of that property, as it is now, and it was the only track and the only way in which they could get into the property by means of a railroad, whether it would not enhance the value of the property.

A. I think not.

Q. Why?

—. Because it would be a track that would be used for general purposes by the railroad company and could not be used by the man owning the property.

Q. If it were a public switch that could be used by anybody in that block and used by this property and the persons occupying it, wouldn't that have a tendency to enhance the value of the property?

A. I would not buy the property at any price if I could only be served by a general track.

46 Q. I am asking you a specific question and you ought to give me an answer whether it would increase or decrease the value of the property.

A. I would say that it would neither increase it or decrease it.

Q. It would leave it about the same?

A. Yes, sir.

Q. You are assuming, in your opinion here, that the railroad company is going to use those tracks all the time, and that that would have a tendency to depreciate the value of the property. Those are some of the items on which you base your opinion that a train is liable to come in there any time—you assume that?

A. Yes, sir.

Q. Suppose the railroad company use that track only during a couple of hours of the day, from nine o'clock to eleven o'clock; suppose only three or four cars are brought in and taken out during that time and they use it at no other time; with the track operated

in that way, would that have a tendency to increase or decrease the value of the property?

A. I should consider it a very serious objection to the property if I owned it.

Q. That is not the question. I am asking you whether, in your best opinion, it would decrease or increase the value of the property.

A. I would pay less for the property.

Q. Suppose the railroad track was there in good condition—suppose the cars only came in between nine and eleven o'clock, only three or four taken in and out during that time—would that have a tendency to depreciate the market value of that property?

A. I should say yes, sir.

Q. Would there be anything to prevent men from coming in wagons and loading and unloading into the warehouse near that track at any time when there was not a train there or cars there?

A. Nothing but the track.

47 Q. The railroad tracks don't hurt anything?

A. If they were built properly—if there was no train there—a team could come in.

Q. The railroad tracks themselves are not dangerous; it is only because trains run there. Suppose during ten hours of the day those tracks were kept clear, could not farmers and men coming with wagons and drays load and unload there in front of that property without danger?

A. If there were no cars there.

Q. Wouldn't that enhance the value of the property having a railroad in front of it, enabling them to come there and get their goods? Wouldn't it enable these people to deliver goods at the front of their establishment, instead of sending them off a block or two?

A. I think not.

Q. Why not?

A. There is a general objection on the part of men seeking a location for business to that kind of a railroad track, unless they can use it for their own specific purpose.

Q. I am assuming that anybody in the block could use the track.

A. I don't see how they could unless there was more than one track. I don't see how a man—say there were two buildings on the same lot, one building belonging to Osborne & Co. and one belonging to somebody else, and there was only one track to serve both—well, when one man would be wanting to use the track the other would be wanting to use it at the same time, and one man would want to send out goods while the other wanted to get them in.

Q. Suppose one wanted it from 9 to 11 and another from 11 to 12 and another from 12 to 1, would there be any conflict about that?

A. Well, you could not get me to purchase it.

Q. Would there be any conflict?

A. I think there would be.

Q. You are using a switch yourself?

A. Yes, sir.
Q. Your own switch?
A. Yes, sir.
48 Q. A private switch?
A. Yes, sir.

Q. You do not seem to see how a general switch could be used so as to prevent a conflict; you cannot discover any way in which it could be done?

A. No, sir; I could not. If you will allow me I can state a case——

Q. I don't want any cases. I want you to answer my questions. You think a switch is not good for anything unless one man has control over it?

A. No, sir.

Q. It is not worth anything?

A. Well, not to say not worth anything, but it would be a serious objection to me.

Redirect examination by Mr. MILLS:

Q. In speaking about these premises you stated that they were injured for the purpose of receiving and delivering goods in small lots. I will ask you what that property is adapted for, whether it is adapted for any other purpose than that of receiving and discharging freight—what is it used for?

A. Which property?

Q. I speak of this Osborne property—the vacant portion and also the occupied portion.

A. I do not understand your question.

The COURT: Do you want to know what that property is eligible for?

Mr. MILLS: Whether it is damaged for any other purpose than that which it is now used for or something kindred to it.

Defendant's counsel objected to this testimony.

The COURT: I will allow him to state what property in that locality is eligible for.

The WITNESS: It could be used for manufacturing purposes or it could be used simply for storage purposes to advantage, but not for a business of the kind that D. M. Osborne & Co. are engaged in or business we are engaged in.

49 By Mr. MILLS:

Q. Wouldn't manufacturing and storage purposes require receiving goods on drays?

A. I am not a manufacturer. I could not answer that question. I should say that there would have to be some goods received and delivered by drays, but not to the extent as the business I am engaged in.

Q. Or that Osborne is engaged in?

A. Or that they are engaged in.

OTTO SCHMITZ, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. You are a civil engineer?
A. Yes, sir.
Q. Associated with Mr. Pitzmann?
A. Yes, sir.
Q. Did you make out this map or plat?
A. Yes, sir; I did. I made the survey from which that plat was constructed (Exhibit B).
Q. Are the measurements and distances stated on this map correct?
A. They are.
Q. I will ask you how close the track or the ties approach to the building line at the western corner of the vacant lot.

The COURT: You mean the southwestern corner of Mr. Osborne's property?
Mr. MILLS: The southwest corner of Osborne's property.

The WITNESS: About eight feet.

By Mr. PIKE:

Q. Where it curves?
A. Yes, sir.

By Mr. MILLS:

Q. Eight feet from the building line—the curb is eight feet from the building line?
A. The curb is eight feet from the building line: yes, sir.

By the COURT:

50 Q. You make the north line of the defendant's track cut the curb line where the western line of Osborne's property would touch the curve if projected south?
A. About; yes, sir.
Q. Look at this plat (referring to defendant's plat).
A. That evidently represents the center of the track and not the edge of the ties that Mr. Mills questioned me about.

By Mr. MILLS:

—. Where does that begin to curve or incline to the north?
A. About at the west line of the present Osborne building.
Q. It begins to curve north?
A. About the western line of the present Osborne building.
Q. Have you made the measurements of the distances between the building line and the tie at a point in the middle of the vacant lot—the center of the vacant lot?
A. I have made a measurement to the center of the track about in the middle of the vacant lot—yes, sir—which is from the curb 9 feet and 8 inches. It would be 7 feet and 8 inches from the building

line to the center of the track, about the middle of the vacant lot—7 feet 8 inches to the center of the track.

Q. I mean outside of the tie to the north. How far would it be to the curb?

A. That would be only about 7 feet—6 or 7 feet.

Q. You say it gradually draws into the north until it strikes the curb about the west line of Osborne's property projected south?

A. Yes, sir; the northern portion of the track strikes the curb about that point.

Q. Do you know how wide an ordinary stake wagon or dray wagon is from hub to hub?

A. No, sir; but I should judge they are about six feet—five or six feet.

Q. In the rear of the building to the north, state whether there is room for a driveway for wagons between the building and the switch that is there.

A. No, sir; there is not.

51 Q. I will ask you whether that switch is on a level with 22nd street.

A. No, sir; it is lower.

Q. Would there be room enough for a wagon to turn round if that switch was filled up so as to make it level with 22nd street?

A. No, sir; there would not.

Q. All the measurements stated on your map are correctly stated from your own survey?

A. Yes, sir.

Cross-examination by Mr. PIKE:

Q. How far are the Missouri Pacific tracks in the rear of the building from the building itself—the main track?

A. The center of the first track is 22 feet 4 inches from the eastern line of the building—the first track of the Missouri Pacific.

Q. You measure from the center of the track?

A. The center of the track.

Q. The track would be four feet eight and a half inches wide, would it?

A. Yes, sir.

Q. That would be 19 feet from the rail to the building?

A. About.

Q. The switch is on that space, on that 19-foot space, the switch that runs into the building?

A. Yes, sir.

Q. There is nothing to prevent a wagon from going down there if that switch was properly ballasted and a road made there and turning in 19 feet?

A. The entire portion of that 19 feet does not belong to Osborne; part of that 19 feet belongs to the railroad.

Q. How much belongs to Osborne?

A. Only about 12 feet.

Q. A wagon could not go in and turn in 12 feet?

A. No, sir.

Q. It could not get up to the rear end of the Osborne building in any way?

A. It could, but it could not drive out again—turn around and drive out.

Q. Couldn't they cross the Missouri Pacific tracks and
52 come up there?

A. Yes, sir; if they would stand the consequences, the danger connected with driving on a track.

Q. There are no consequences flowing from the tracks themselves?

A. It is very difficult driving over railroad tracks with a wagon, I should judge.

By Mr. MILLS:

Q. They are not filled up, level?

A. No, sir.

By Mr. PIKE:

Q. It is the train on the tracks that makes them dangerous and not the tracks themselves?

A. Part of the track, too, is not level with the ground.

Q. I am assuming that they were ballasted so they could drive over them. There is no trouble about that?

A. No, sir; if made level and smooth there would be no trouble.

Q. There would be 19 feet between the track and the building line?

A. There would be about 12 feet, I said.

Q. You said 12 feet of Osborne's ground. Of the whole ground there would be 19 feet?

A. Yes, sir.

Q. What was the distance between the Missouri Pacific main track, in the rear of that building, and the Gratiot-street track, about 150 feet?

A. Yes; about that.

Plaintiff's counsel offered in evidence the plat made by the witness, and the same is marked Exhibit B.

S. J. FISHER, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. You are engaged in the real-estate business?

A. Yes, sir.

Q. How long have you been engaged in that business in St. Louis?

A. About thirteen or fourteen years.

53 Q. How long have you been in that business altogether?

A. Twenty-five years.

Q. Are you familiar with the property of D. M. Osborne & Co. on the corner of 22nd and Gratiot street?

A. Yes, sir; I have seen it.
Q. How recently?
A. Within a couple of months—six weeks.
Q. I will ask you what effect, if any, has been had upon the market value of this property by the construction of this switch on Gratiot street on front of the property.
A. It has a tendency to damage the property—detract something from its value.
Q. In what way?
A. To the extent that it renders traffic by vehicles or drays to any extent dangerous or uncertain—the approach, hauling to, or hauling from.
Q. For what purpose is that property adapted?
A. I should think it would be adapted for a warehouse or some kindred purpose—storing, perhaps manufacturing; such purposes as those.
Q. What effect, if any, would that track have upon the vacant property, as to its being salable?

Defendant's counsel objected to the question.

By the COURT:

Q. What effect it has upon its market value?
The WITNESS: It would tend to depreciate it just as it would improved property; of course, to a less extent, as the purpose to which it is to be applied is not yet fixed; perhaps not quite so much.

By Mr. MILLS:

Q. Considering the fact that the switch at the western portion of the vacant lots cuts the curb and inclines from the eastern portion of the vacant lot northwardly till it reaches the western
54 portion, where it cuts the curb, what effect would that character of switch have upon the market value of the property?

Defendant's counsel objected to the question as immaterial.

The COURT: I do not care about the amount now; whether it lessens these values to a greater or less amount I am not concerned with now.

Cross-examination by Mr. PIKE:

Q. When did you see this property last?
A. About six weeks ago, I think.
Q. How long ago?
A. Six or eight weeks ago.
Q. Were you acquainted with the property before you went to see it?
A. Not, except as to the general location of it.
Q. Have you much property for sale down there?
A. We have some further west and further east.

Q. Do you know of any sales having taken place down there on that street or on that block recently?

A. No, sir.

Q. You have not sold or bought any there?

A. No, sir.

Q. You don't know from actual sales whether the market value has increased or decreased?

A. Not from actual sales; no, sir.

Q. It is just your opinion that the fact that the railroad track is in that street would have a tendency to depreciate the market value of the property for manufacturing, storage, and that sort of purposes?

A. Yes, sir; from my experience in dealing in property in general.

Q. I will get you to state if railroad tracks in a street in front of such property as that is there do not have a tendency to increase the value of the property by making it more accessible.

A. I would state that I should think if a man had not any other facilities whatever, no other railroad facilities——

Q. Suppose a man owning property there had no facilities except the track in front of the property on that street, wouldn't that have a tendency to increase the value of the property?

55 A. If a man's business was such that he needed to have a switch or communicate with railroads directly it would, perhaps, tend to enhance the value.

Q. Isn't it a fact universally conceded that the nearer you get with manufacturing or storing or warehouse property to a railroad the more valuable the property is?

A. Well, we have property——

Q. Answer the question.

A. Please repeat that question.

Q. Isn't it a fact universally conceded in reference to property that could be used for storage or manufacturing purposes that the nearer you get to a railroad track the more valuable the property becomes?

A. Yes, sir.

Q. Now, you can go on and explain.

A. We often have property where it has railroad facilities and the fact that it has tends to enhance the value of the property.

Q. Did you look this property all over and see its condition?

A. Yes, sir.

Q. Did you see that it had railroad facilities in the rear of the property?

A. On the north?

Q. In the rear.

A. Yes, sir; ample facilities.

Q. And you saw this track there in front of the property?

A. Yes, sir.

Redirect examination by Mr. MILLS:

Q. When you speak of property being enhanced by having rail-

road facilities I will ask you whether or not such property must also have street facilities—facilities for being reached by wagons and drays.

A. Of course. I answered the question generally.

Q. Is there not such a thing as property having too much of railroad facilities?

A. As a matter of course, certainly. Too much damages it, of course.

56 Q. You say you have seen this property. Considering the railroad facilities in the rear and the character of the switch in front, state whether the switch in front has enhanced or depreciated the value of the property.

A. It has depreciated the value of it.

By Mr. PIKE:

Q. You simply give that as your opinion, without knowing from actual sales that that has taken place; it is simply an opinion?

A. Simply an opinion as an expert; yes, sir.

CHARLES F. VOGEL, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. How long have you been engaged in the real-estate business?

A. A little over two years.

Q. Have you examined the property of D. M. Osborne & Co. on 22nd and Gratiot street?

A. I have.

Q. How recently?

A. About three months ago.

Q. Please state, in your opinion, what has been the effect upon that property, built and situated as it is, by the construction of the switch on the Gratiot-street front.

A. I think it has had a tendency to decrease the value of the property.

Cross-examination by Mr. PIKE:

Q. Why?

A. Because it interferes with the legitimate use for which the building was constructed and designed; it interferes with the work.

Q. Did you take notice that they had railroad facilities in the rear of that property?

A. Yes, sir.

Q. And that all their goods that came by railroad were delivered at the rear end of the property?

A. Yes, sir.

Q. You think the fact that the track is laid in front of the property would have a tendency to decrease the market value?

A. Yes, sir.

Q. Have you any property for sale in that immediate
57 neighborhood?

A. No, sir.

Q. Have you bought any there?

A. No, sir.

Q. You do not know from actual sales whether that property in that block from the running of that switch there, being in front of that building, would bring less?

A. It is only my opinion.

Q. You know nothing about it from actual sales?

A. No, sir.

Q. It is just a mere opinion of yours?

A. Yes, sir, judging from surrounding circumstances.

Q. Did you take into consideration that there were two entrances on 22nd street and that they had an opportunity to haul from there in wagon-load lots? Did you take that into consideration?

A. Yes, sir.

Q. You assume the simple fact to be that the railroad track down there in front of the property would depreciate the value of the property?

A. Yes, sir.

Q. You mean without regard to how it was? Would you assume the railroad track was used all the time or not?

A. How is that?

Q. Suppose the railroad track was only used for an hour or two a day and at specific times—that only a few cars were taken out a day—would that have any effect on changing your opinion?

A. No, sir; because people wouldn't know the time.

Q. If there was a particular time that the railroad was operated and they only took in and out three or four cars a day, you think it would be doubtful whether it would depreciate the property at all?

A. The damage would not be so great.

Q. You think the fact that it was there, no matter how little it might be used, would have a tendency to depreciate the value of the property?

A. Yes, sir; because teams would be wedged in between the two railroad tracks.

Q. The railroad tracks, whether there were any cars there
58 or not, would not make any difference?

A. It has a tendency to depreciate the property.

Q. The cable road has a tendency to depreciate property?

A. So they say.

Q. All street railroads have a tendency to depreciate property?

A. Not so much as steam railroads.

Q. What is that?

A. Street railroads have no tendency to depreciate property.

Q. Steam railways do?

A. Yes, sir.

Q. Do you think the steam railways depreciate property in Carondelet?

A. They depreciate it on Poplar street. That is the reason that part of the town is dead, on account of that Poplar-street track.

Q. That has not been my experience nor the experience of other real-estate men.

A. We find in our business that people do not want to go south on account of the Poplar-street track; they prefer to go west or north.

DAVID F. KAIME, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. How long did you say you had been engaged in the real-estate business?

A. About twenty-five years.

Q. Are you familiar with the property of D. M. Osborne & Co. on 22nd and Gratiot street?

A. I have seen it. I went down there and saw it.

Q. How recently?

A. I think it was in December, probably.

Q. Will you state to the court what effect upon the building and upon the vacant property has been had by the construction of the track on the Gratiot-street front?

Mr. PIKE: As to its market value?

Mr. MILLS: Whether or not it has affected the market value.

The COURT: Either to enhance it or decrease it.

59 The WITNESS: Only the opinion I have; that is all.

By Mr. MILLS:

Q. What is your opinion?

A. That it would depreciate it. That track that runs up Gratiot street in front of the premises?

Q. Yes.

A. Yes, sir.

Q. What effect would it have on the vacant property?

A. The same effect as the other; it would depreciate it according to what it is worth, in my opinion; that is all. Perhaps it would have more if you wanted property. One part of it has a front upon 22nd street; the vacant part has no front anywhere except on Gratiot street and the railroad track.

Q. That could only be used with an accessible front on Gratiot street?

A. I do not see how it could be used any other way except by the switch track that they have on the north side of it.

Q. What effect is there on property of that kind by cutting off the facilities for approach by wagons or drays?

Defendant's counsel objected to the question as having been answered. Objection sustained.

Cross-examination by Mr. PIKE:

Q. What effect would that track have on the value of property

there, this Osborne property, provided that was a manufacturing or warehouse establishment and it was made so that there would be a switch run into it from that track—what effect would that have upon the property, increase or decrease its value? This is what I mean: Take the track as it runs there, and suppose you erect a warehouse on this vacant property and run a switch from the Gratiot-street track into the building, what effect would that have, increase or decrease the value of the property?

A. I can hardly see any use of a track in the building. At present they have a track——

Q. No; I am assuming that they built a warehouse and
60 had a track run in there for the purpose of loading and unloading.

A. According to my recollection, that switch comes up to their building on the north side.

Q. I am speaking of the vacant lot.

A. I know it comes up to the north side of the vacant lot, if I remember right, and if they built on the vacant lot they would have a track right as near as you could have a car.

Q. They could load and unload from that?

A. Oh, yes.

Q. Wouldn't that have a tendency to appreciate the value of the property instead of decreasing it?

A. The north side, I think it would.

Q. Suppose they had no facilities in the rear, do you think that would have no tendency to appreciate the value?

A. I think the north track would have a tendency to appreciate the property—make it more valuable.

Q. I am not speaking of their present switch; I am speaking of the Gratiot-street front. Suppose there was no north track, what effect would that have on the property?

A. If there was no north track?

Q. Yes; that would give them railroad facilities, wouldn't it?

A. Yes, sir; of course.

Q. That would have the tendency to increase the value of the property?

A. That would depend a good deal on what you used that property for. I don't know how you could get to it if you have a track on Gratiot street and one immediately north.

Q. I am not speaking of the one north.

A. The railroad company have tracks north. The main track is close by the building. It is only wide enough for one track.

Q. You have no property for sale there?

A. No, sir.

Q. You have not sold any there nor bought any there since the track was put down or before?

A. No, sir.

Q. It is simply a matter of opinion or guess?

61 A. All guess; yes, sir.

Redirect examination by Mr. MILLS:

Q. As this property is situated, suppose there were no track on the north side, and this track was running into it on the south side on Gratiot street, would that property be accessible for teams, or would it be salable—would it have a market value?

A. It might have a market value for simply warehouse purposes, only where whatever came to the warehouse would be brought by rail and shipped by rail; that would be all.

Q. But not for general purposes?

A. No.

Recross-examination by Mr. PIKE:

Q. You are assuming that the track is going to be used all the time—the Gratiot-street track?

A. I am assuming that they are going to use it whenever they want to.

Q. Suppose they use it only an hour or two a day, would that have any effect, in your opinion, as to whether that would appreciate it or depreciate it?

A. I think if such an agreement as that could be entered into and not abrogated it would have that effect.

Q. I am not speaking of agreements. Suppose that was the custom.

A. Customs change so, I would not want to risk it.

Q. In other words, if you see a railroad track in the street you think the engine is liable to run on it any time?

A. I think they build them to run whenever they choose, so far as I am able to judge.

Q. That is an assumption, and that assumption helps you to form your opinion, which you say is a mere guess?

A. Yes, sir.

By the COURT:

Q. What is the particular injury, in your opinion, that is done by having that track on 22nd street, that causes the depreciation in value?

A. You mean the track on Gratiot street?

Q. You said it depreciates the value of the property. I
62 suppose it depreciates it because it injures it in some way. I want to know what, in your opinion, causes the particular injury.

A. Now, south of this property on Gratiot street, that is the only street where teams can go on to get to this property without being in full sight of the railroad, as the engines and cars are running up and down, and if they go to the property on the south side they are hidden entirely from the railroad, and these teams have room there and a place to turn and load and unload and have access to the building, and if this track is there and they are running cars on that there is not room enough for a team to go between the track and the curb or stand there.

Q. Your idea is it shuts off access?
A. It shuts off access on that side of the building.
Q. To some extent?
A. To some extent. Of course, it depends a great deal on what the property is used for, in regard to the depreciation of it.

OSCAR D. CARPENTER, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. What business are you engaged in?
A. The plow business.
Q. What is the style of the firm?
A. The Oliver Chilled Plow Works.
Q. Where is your place of business?
A. We are at present on the corner of 11th and Clark avenue.
Q. Are you familiar with the premises occupied by D. M. Osborne & Co., on 22nd and Gratiot street?
A. I have been there several times.
Q. How long have you been manager of your concern in this city?
A. I came here in October, 1883, a little over five years.
Q. Do you remember the premises before the Gratiot-street track was put down?
A. I do.
63 Q. I will ask you whether or not your firm contemplated using a building to be erected on the vacant portion of ground west of the present building of Osborne & Co.

Defendant's counsel objected to the question as incompetent.

The COURT: There is no harm in that question, so far. Now, what is the next?

By Mr. MILLS:

Q. I will ask you this, Whether the construction of the Gratiot-street track had any effect upon the desirability of the location of a building upon that vacant property?

Defendant's counsel objected to the question as incompetent.

The COURT: You need not answer that for the present. I hardly think it is competent to show that a particular person refused to buy the property on account of that railroad being there. It does not follow because one man has done so there might not be a dozen who would have bought it notwithstanding the fact. I think you are confined to showing what effect the track has had upon its market value.

By Mr. MILLS:

Q. Was the vacant portion of the property adapted for use if a building had been constructed thereon for storage or for the purpose of handling agricultural machinery or general merchandise.

Defendant's counsel objected to the question as being merely speculative.

The COURT: I think what the property is generally eligible for is a matter of expert opinion. I do not think you have shown yet that the present witness is qualified to express an opinion of what property of that kind is generally eligible for. He might not think it would be eligible for his business, yet there might be a good many other kinds of business that it would be eligible for. This is a matter for men to express an opinion on who have acquired a
64 general knowledge of the real-estate business and of the eligibility of property in different sections of the city.

By Mr. MILLS:

Q. How many different locations have you occupied since you have been here as manager of the plow works?

A. We have been in the same place for about ten years—that is, the firm has had the same location since I have been in the city.

Q. Have you ever sought for any other location?

A. Yes, sir.

Q. Have you examined other property?

A. Yes, sir.

Q. And you examined this property?

A. Yes, sir.

Q. Well, I will ask you this question, whether or not that property—the vacant portion—was eligible for the purpose of warehousing property or distributing agricultural machinery or other merchandise before the Gratiot-street track was put down.

Defendant's counsel objected to the question. The court sustained the objection on the ground that the witness had not been shown to possess sufficient qualifications to speak on the subject.

Cross-examination waived.

DIEDERICH NORDEN, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. Where do you live?

A. 2145-'7 Gratiot street.

Q. How long have you lived at that location?

A. On this particular place?

Q. On those particular premises.

A. I have been on one side of the street eight years and the other side six years—14 years altogether.

Q. Are you on the north or south side of the street?

A. On the north side.

Q. Do you occupy the corner of 22nd & Gratiot street?

A. Yes, sir.

65 Q. Do you have a grocery store there?

A. Yes, sir.

Q. You say you were formerly on the south side of the street, between 21st and 22nd?
A. Yes, sir.
Q. On the south corner?
A. Yes, sir.
Q. That was a public highway before this track was put down, was it not?
A. Yes, sir.
Q. Was there any travel there of people generally on Gratiot street?
A. Well, the same as any other street; the regular, usual travel like on any other street; whatever business was done on the street.
Q. Do you own the premises occupied by you?
A. No, sir.
Q. Do you own premises on Gratiot street?
A. No, sir.
Q. Have you a lease on that property?
A. I leased this for 15 years where I am at.
Q. How long ago?
A. A fraction over five years; it has got ten years to run.
Q. Have you a mortgage on any portion of that property?
A. Yes, sir; I have a mortgage on it.
Q. Since the construction of this track, what has been the effect on travel on Gratiot street?

Defendant's counsel objected to the question, as the simple fact here is whether the value of this property has been depreciated or appreciated.

The COURT: I will allow him to show the fact of what the actual effect has been on travel.
The WITNESS: It has affected it a great deal; the travel is only what is necessary or compelled to go there, and formerly there were all different wagons that went through that street that had no particular business right in that block; they took it as a public highway, as they called it.

By Mr. MILLS:

Q. What is the reason they do not use it now?

66 Defendant's counsel objected to the question. Objection sustained.

Q. What room is there for wagons to travel on that street while the street is in use by trains?
A. Well, I should judge——

The COURT: This map shows the width of that track and you have proved the width of the street and it is a mere matter of mathematical calculation of what space there would be.

By Mr. MILLS:

Q. What effect has the laying of that track had upon the market

value of this property of Osborne & Co. on 22nd and Gratiot street?

Defendant's counsel objected to the question, as the witness has not shown himself to be an expert.

The COURT: I think a man that has lived in that neighborhood as long as he has, being the owner of a lease for a 15-year term, is qualified to express an opinion. You may answer the question.

The WITNESS: It is affected to a certain extent.

The COURT: We do not care how much; we want to know whether it has enhanced or depreciated it in value in your opinion.

The WITNESS: It has enhanced—depreciated it.

By Mr. MILLS:

Q. It is worth less than it was before?

A. Yes, sir.

Q. Are you a member of the house of delegates now?

A. Yes, sir.

Q. Were you familiar with the introduction of an ordinance in 1886 for the construction of a track on Gratiot street, which was introduced by the St. Louis Wire Mill Company?

Defendant's counsel objected to the question as incompetent. Objection sustained.

Q. Is this switch used by any other person or corporation than the St. Louis Wire Mill Company?

67 Defendant's counsel objected to the question as incompetent and immaterial. Objection sustained.

Q. Were you familiar with the fact that the St. Louis Wire Mill Company introduced an ordinance for the purpose of having a track laid to its premises during the session of 1886–'7 of the city council of St. Louis?

Defendant's counsel objected to the question. Objection sustained.

Cross-examination waived.

JULIUS PITZMAN, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. How long have you been city surveyor of the city of St. Louis?

A. Since the separation of the city from the county; since the adoption of the scheme and charter.

65 Q. You are a surveyor and are familiar with the property of St. Louis?

A. Yes, sir.

Q. For how long have you been?

A. I was in the employ of the city in 1855, and I have been in the city ever since, except during the time I was in the army.

Q. Have you acted as commissioner for the purpose of assessing values and damages and benefits by appointment of the circuit court of the city of St. Louis?

A. In what kind of cases?

Q. In partition cases, street openings, &c.

A. Yes, sir.

Q. And condemnation proceedings?

A. Yes, sir.

Q. Are you familiar with the values of property in the city of St. Louis generally?

A. Yes, sir.

Q. Have you looked at the property occupied by D. M. Osborne & Co., on the corner of 22nd and Gratiot street, in the city of St. Louis, recently?

A. Yes, sir.

Q. Was this survey which has been offered in evidence made under your supervision?

68 A. Yes, sir. I examined the property subsequently to see whether it was correct.

Q. From your experience in property in the city of St. Louis, I will ask you what effect the construction of that track on Gratiot street, in front of the buildings of D. M. Osborne & Co. and the vacant lot, was had by the construction of the track, and whether its value has been enhanced or depreciated by such construction.

A. I think the property is injured by the construction of that switch.

Mr. PORTIS: Do you mean the market value, Mr. Mills, or some specific value?

Mr. MILLS: I mean the market value; I speak wholly of the building and the vacant property.

The WITNESS: I think the whole value of the building, as well as the fee simple of the vacant property, is injured by the construction of that switch.

By Mr. MILLS:

Q. In what way?

A. Well, because the property has all the switch facilities it needs; having switches on the north side and tracks, it gives them all the railroad facilities they want, and they would naturally want to use the other street uninterruptedly for filling their warehouse or discharging freight received by the railroad.

Q. Could the vacant lot be used for any purpose to advantage with this track in front of it?

A. That depends to what extent that railroad switch is operated and the damage done to the property; that depends on the frequency of trains along that switch.

Q. Suppose there was no restriction to the use of the track in the passage of trains to and fro?

A. I can imagine a certain condition of things by which it will

injure more materially that property—the track being up to the curbstone.

Q. I will ask you whether Gratiot street is an open and im-
69 proved highway in front of these premises.

A. Yes, sir; it is an open and improved street, and has been used for a long time by the city for public use.

Q. Curbed, guttered, and macadamized?

A. Curbed, guttered, and macadamized.

Q. And pavements?

A. And pavements.

Cross-examination by Mr. PORTIS:

Q. Suppose no other railroad facilities was had by that property except this track. What effect would that have on its value?

A. If this was the only track there by which the property could be reached, I think it would be a benefit in place of an injury.

Q. You said it would depend on the frequency with which trains passed there over that track as to the effect?

A. Yes, sir.

Q. Suppose only two or three or four cars a day pass over that track. What do you think would be the effect, say, within a day?

A. I think, then, the damage would be very trifling.

Q. Suppose the passage of those few cars should be confined within certain hours within the day, say from nine o'clock to 11 o'clock in the morning. Would that have a tendency to make it still more trifling?

A. It depends entirely upon the person using the property. If the business was so arranged that the warehouse would want to discharge its goods at that time or want to receive goods, it would certainly injure it.

Q. You think, if I understand you, that if the business to be transacted in that house or on that property happened to be at that hour that it might be worse for it?

A. How is that?

Q. If the business Osborne & Co. wished to transact happened to be between those hours—9 and 11 o'clock—when the trains were running there, it would be worse for it?

A. Yes, sir.

Q. Suppose it could be arranged for it to be done at some
70 other time than the time at which they wished to do their business?

A. Of course the damage would be less. The damage is precisely in keeping with the number of trains operated on that road during business hours.

Redirect examination by Mr. MILLS:

Q. In reference to the vacant lot you stated it might be a benefit to have the track on the Gratiot-street front, if that was the only track?

A. Yes, sir.

Q. Are there not nine tracks on the north side of that vacant lot already?

A. I do not recollect, without referring to the map, how many there are, but there are a great many other tracks there; there are about that many.

Q. Is there any possible access to that property from the north side, as the tracks are now constructed?

A. No, sir; not except by rail.

Q. No wagon or truck can possibly go there?

A. Not after you built up that lot.

Q. West from that vacant lot whose property is that—is that railroad property?

A. I do not know.

Q. Then you say that with so many tracks in the rear that additional track in front does injure the property?

A. Yes, sir; because that front is wanted for the purpose of discharging goods received by rail.

Q. With that track in front and with the number of tracks in the rear is there convenient access to that vacant lot by wagons or trucks?

A. The amount of damages, as I stated, depends entirely on the frequency of the number of trains that would use that switch.

Q. Suppose there is no certainty when those trains are run during business hours, what effect would that have in the way of increasing damages?

Defendant's counsel objected to the question as immaterial.

71 The COURT: I think the whole subject is covered by the witness' answer that the amount of the injury depends on the frequency with which cars run. That covers the whole case.

By Mr. MILLS:

Q. Does it depend on the frequency or uncertainty?

A. No, sir; I think it depends on the frequency. I think the teams that generally do hauling are not afraid of railroad trains.

By the COURT:

Q. You base your opinion that it depreciates the value of that property, I understand Mr. Pitzman, solely on the ground that it deprives the property of convenient access—the property on the south side?

A. Yes, sir; that constitutes the value of property of that class. You have got the railroad on one side to receive your goods and a place on the other to fill your warehouse or to load and unload.

Q. Is there any other injury that you have in mind to the property than that of shutting off access?

A. No, sir; I don't think there is any other injury to it.

By Mr. MILLS:

Q. I will ask you this—whether or not this four-story building is affected or liable to be affected by the smoke and gas of passing

trains; whether or not that has an effect on the value of the property.

Defendant's counsel objected to the question as immaterial. Objection sustained.

— MORRISON, sworn for the plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. What is your business?
A. I am a builder.
Q. Did you have anything to do with constructing the building of D. M. Osborne & Co. on 22nd and Gratiot street?
A. Yes, sir; I did.
72 Q. How long have you been engaged as a builder in the city of St. Louis?
A. About 15 or 16 years, I think.
Q. Do you own any real estate in the city?
A. Yes, sir.
Q. I will ask you whether you did anything in the way of constructing plans for a building to be erected on the vacant lot west of the present building of D. M. Osborne & Co.

Defendant's counsel objected to the question.

The COURT: What do you propose to show?
Mr. MILLS: I propose to show that they were ready to build, and after the track was constructed they declined to do it.
The COURT: I will sustain the objection to that.

By Mr. MILLS:

Q. What effect, if any, on the value of the present building has been the result of the construction of the track on Gratiot street? Whether the construction of it has enhanced or depreciated its value.

Defendant's counsel objected to the question as immaterial. Objection overruled.

A. It would depreciate it.
Q. What effect has it had upon the vacant lot west of the building?
A. It would depreciate that more than it would the other—the corner.
Q. For what reason?

Defendant's counsel objected to the witness' reason. Objection overruled.

The WITNESS: Because it would directly affect, you might say, your teams or anything of that kind. If a man has a horse that is scary or a team that is not used to railroads, the locomotive comes along, and there would be great danger of them running off.
Q. Do you remember what use was made of that street before the switch was put on there?

73 A. Yes, sir; it was used as a thoroughfare. I used to drive in there, but since the track has been put there I have always taken the street south of there.

Defendant's counsel objected to this testimony.

Q. What was the vacant property adapted for prior to the construction of the track?

A. It was for warehouse purposes. You could get to it from the rear, and also from the front. If persons wanted to drive in with teams they could go in front. I do not see how it could be used now for warehouse purposes, except in car-load lots. A team could not turn around there—that is, it could not a few weeks ago. I don't know how it is to-day unless the track has been lowered within the last two or three weeks.

Q. You say the track has been lowered?

A. I say without it has. I don't know how the railroad track now is. If it is like it was some time ago, when I used to drive down there, a wagon could not cut across.

Defendant's counsel objected to this testimony as immaterial. Objection sustained.

Cross-examination by Mr. PIKE:

Q. Why do you say that track would depreciate the market value of that property?

A. Why?

Q. Yes; what is the reason?

A. Because it is hemmed in on three sides—on all sides, you might say—with railroad tracks.

Q. What is to prevent a wagon driving up in front of those buildings and standing there?

A. If a locomotive comes along and the horse was not used to a railroad track——

Q. Suppose no cars came along. The cars are not running all the time there?

A. I don't know that they are.

Q. Do you know how many cars run in on that track every day?

A. I do not. I know I came pretty near getting caught one day, and I should not like very much to get caught.

Q. That has not anything to do with the answer to my question. I asked you if you knew how many cars went in there and

74 out every day.

A. I do not.

Q. You assume the cars are running constantly backward and forward, so that a man could not go in there with his team?

A. If the railroad track is there a man has got to assume it is there for something.

Q. Suppose there were only three or four cars taken in and out a day, would that have a tendency to depreciate the value of the property?

A. It would have if I had anything to do with it.

Q. Would that make access from Gratiot street impossible or difficult?

A. Yes, sir.

Q. You could not get in there because some time during the day they took three or four cars in and out?

A. I said it would be as far as I am concerned.

Q. You wouldn't like to stand on a track—you wouldn't like to cross it—where they put in three or four cars a day or took them out?

A. I wouldn't want the property fronting on it.

Q. You think it is a very dangerous place, don't you?

A. Yes, sir.

Q. They could take in three cars in a half an hour in the morning and take them out and that makes it a dangerous place during the whole 24 hours?

A. What little experience I have had with railroads——

Q. My questions don't require an answer of that kind. Isn't it a mere guess on your part as to whether the market value of that property is depreciated or not?

A. I don't think it is.

Q. You don't own any property down there?

A. No, sir.

Q. You don't know of any sales having been made there in the last six or seven years?

A. I know all about that property.

Q. Answer my question—whether any sales of property have been made there.

A. Not in that immediate locality.

Q. You don't know what the property was worth before the track was put in there—what they asked for it a foot?

A. About.

75 Q. And you know what it is now?

A. No, sir; not exactly. A man can't tell until it is put under the hammer to see what it will bring.

Mr. Mills, of plaintiff's counsel, states to the court that to make one matter of record clear that it is stipulated by both parties that the date on which the track was laid was March 20th, 1887, and the bill was filed on the 16th of February and served; also that there is no dispute that the titles to the premises were in complainant at the time of the filing of the bill.

J. W. H. Higbee, sworn for plaintiff, testified as follows:

Direct examination by Mr. Mills:

Q. What is your business?

A. I am connected with D. M. Osborne & Company.

Q. How long have you been connected with the St. Louis office?

A. About four years.

Q. You have been out at the Gratiot-street place since it has been built?

A. Yes, sir.

Q. What particular department do you have there?
A. My business?
Q. Yes.
A. Assistant manager.
Q. Your duties keep you largely in the office?
A. They do.
Q. Where is the entrance to that building for foot passengers?
A. On Gratiot street.
Q. Is there any entrance for foot passengers on any other street than Gratiot street?
A. There is not.
Q. Any person coming to the office on business, whether in a vehicle or on foot, would come to the Gratiot-street front?
A. That is necessary to get in.
Q. There are no steps to make entrance to any other door easily accessible?
76 A. There is only one flight of stairs on the south side.
Q. That is on Gratiot street?
A. Gratiot street.
Q. You were there before this track was laid?
A. I was.
Q. Please state what inconveniences, if any, you have suffered in your occupancy of those premises since that track was laid.

Defendant's counsel objected to the question as incompetent and immaterial.

The COURT: What inconveniences you have suffered that are due to the track—the laying of the track—you can state.
The WITNESS: The inconvenience of loading and transportation of goods by wagon in general.

By Mr. MILLS:

Q. What proportion of the goods received and discharged from that warehouse are received and discharged by wagons?
A. I should say probably one-tenth of the goods received come by wagon and three-quarters of the goods that go out are by wagon.

The COURT: The goods that you ship?
The WITNESS: Yes, sir.

By Mr. MILLS:

Q. Before that track was laid was the street in front of Gratiot street opened to teams?
A. Yes, sir.
Q. Was that used as a regular street for public travel?
A. Yes, sir.
Q. How has it been since that time?
A. The travel has been greatly diminished.
Q. Have you been able to use the Gratiot-street front for the purpose of receiving and discharging freight by wagons?
A. Not with any degree of success whatever.

Q. Have you been able to serve customers who came with their own vehicles on the Gratiot-street front?

A. Seldom.

Q. For what reason?

77 A. The trains passing either way have prevented teams from driving there; stopping there to load or unload.

Q. Do you know of any persons objecting or declining to come there on account of the track?

A. I do not at present.

Q. How many trains a day have passed there, if you know?

A. I do not know positively, but I am located on Gratiot-street side and it seems that there must be from three to five trips made, which would make from six to ten passings a day.

Q. At what hour of the day are those trips made?

A. They seem to be made from nine o'clock until three in the afternoon, or four—during the business portion of the day.

Q. Do you know whether in switching the cars to the wire mill company they have been in the habit of switching other cars?

A. I could not say. I have seen as many as eight cars in one train. I have no means of knowing whether they are wire-mill cars or not.

Q. Is there any regularity as to the time in which those trips are made?

A. Not to my knowledge.

Q. Has this been going on continuously since the track was laid?

A. It has.

Q. How many doors are there on the Gratiot-street front?

A. Two doors.

Q. Describe those doors.

A. One door is the entrance for people on foot, or the entrance to the building, in fact, and the other door is for unloading purposes.

By the COURT:

Q. Is that a double door?

A. A double door; a large double door.

Q. One you can drive in?

A. No, sir; you can't drive in.

By Mr. MILLS:

Q. With reference to smoke or gas, I will ask you whether there has been any inconvenience resulting from the operation of

78 the track on Gratiot street.

Defendant's counsel objected to the question.

The COURT: My present view is that is not an item of damages; but I will allow them to put that proof in, subject to the objection, and I will consider it further hereafter.

The WITNESS: The annoyance is very great. I, perhaps, feel it more than the rest, but it is great to all. The black smoke comes from the engine, and the office, being above the grade, is about on a level with the top of the engine, and the smoke pours in and makes

it very disagreeable when the wind is from the south, which is the case in St. Louis generally. The noise is also very disagreeable. It is almost impossible to hear unless you get close together.

By Mr. MILLS:

Q. Do you know of any occasion in which trains have become stalled or stuck on the track?

Defendant's counsel objected to the question. Objection sustained.

Q. State, if you know, whether the street has been used for loading purposes—loading cars on the track from the street.
A. I could not say as to that.
Q. What property is there on the west of your vacant lot?
A. I believe it belongs to the Missouri Pacific.
Q. What outlet has the vacant property for the purpose of discharging freight by vehicles?
A. It has practically now no outlet. It is hemmed in completely.
Q. Are there any openings in the west wall of the warehouse building?
A. There is one into the shed which joins the warehouse.
Q. That is, in the rear?
A. In the rear.
Q. None in the building proper?
A. No other opening.

By the COURT:

79 Q. Is that warehouse of yours a place where you sell property—where customers come and buy—or do you have a place elsewhere where you sell?
A. That is the place where we do all our business—storing, selling, shipping, and everything—our general office.
Q. Where is your show-room or exhibition-room for your goods?
A. It is located in the front of the building, on the south side—on the Gratiot-street side, on the first floor.

Cross-examination by Mr. PIKE:

Q. How many doors have you on 22nd street?
A. Two.
Q. Did I understand you to say that three-quarters of the goods that you sold went out in wagons?
A. Or more—yes, sir.
Q. The goods you send off? Do you mean three-quarters of the goods you send from that place down there go out in wagons?
A. That is my belief.
Q. Where are they loaded onto the wagons?
A. From the doors.
Q. Which doors?
A. From the 22nd-street doors, mostly.
Q. Do you load any from Gratiot street?
A. Not very many.

Q. Do you load any?
A. Once in a great while.
Q. What proportion of the goods do you load on Gratiot street?
A. The one-hundredth part or less—scarcely any. We seldom go to that door.
Q. The balance of them you load on 22nd street?
A. Yes, sir.
Q. You have two doors there. There is no trouble about loading them onto wagons there?
A. No trouble. The doors are all right. The only trouble experienced is in driving there between the two tracks, as has been stated.
Q. There is no track on 22nd street?
A. No, sir.
Q. It is about 150 feet from Gratiot street down to the Missouri Pacific tracks in the rear of your premises?
A. About that.
80 Q. Do you do a retail business there?
A. We do both a retail and wholesale.
Q. All of your wholesale goods go out of the rear part of the building onto the cars—that is, when you sell in car-load lots?
A. Yes, sir; but by no means do all of our wholesale goods go out in that way.
Q. Where do the balance of them go out?
A. By wagon.
Q. They go out of the 22nd-street door?
A. Yes, sir.
Q. How many cars generally go in and out there—go along there in front of your premises in a day—go into the wire mill and come out of the wire mill?
A. Well, I couldn't say; they have from two to five or six or seven cars behind the engine every time.
Q. Isn't it a fact that all of that shipping is generally done between nine and eleven o'clock?
A. No. I think the greater portion may be, but there is a great deal of traffic in the afternoon frequently, as I remember.

By the COURT:

Q. What do I understand is your position there?
A. In what respect?
Q. With D. M. Osborne & Company.
A. Assistant manager.
Q. Do you claim to have what is termed transient custom at that place—customs obtained merely because they happen to be passing along the street?
A. No; we have a great deal of trade that comes in from the surrounding country, that drives in.

By Mr. MILLS:

Q. In reference to that transient custom the court spoke of, nobody comes there except they want your machines?
A. That is the idea—it is supposed they want to get our machines.

Q. They have been drummed up in the country and come there to your place?

A. They come there from drumming or know us by reputation.

81 JAMES M. PETERS, sworn for plaintiff, testified as follows:

Direct examination by Mr. MILLS:

Q. What is your business?

A. I am billing clerk of D. M. Osborne & Company.

Q. Is your position in the office?

A. Yes, sir.

Q. How many employés are there in the office generally?

A. About eleven.

Q. How long have you been there?

A. Since 1886.

Q. You were there, then, before this track was laid in Gratiot Street?

A. Yes, sir.

Q. Have you had any occasion to notice how often those trains move on Gratiot street?

A. Yes, sir.

Q. Give the court your recollection on that subject, how many trains a day and when they run.

A. Well, I have seen four trains a day, and at other times two and three.

Q. When you speak of four trains you mean trains in and out?

A. I mean trains down. One train makes two trips.

Q. By four trains you mean four round trips and that means eight trains?

A. Yes, sir; eight trains passing the house.

Q. How many cars are there?

A. That depends on the switch. I have seen as high as eight or ten cars go from our house to the wire mill.

Q. Do they ever use cars in switching that are not intended for the wire mill?

A. I think they do. They have had flat cars go down empty and come back empty.

Q. At what hours of the day do they run?

A. Different times. I have seen them in the morning and the afternoon as late as four or five o'clock in the evening.

Q. Is there any regularity as to the time they come and go?

A. No, sir; not that I have noticed.

Q. Is there any certainty or notice or any schedule by which you can know when they come?

82 A. None that I ever heard of, sir.

Q. From the front of the warehouse how far is the nearest point at which a train can be seen coming down the switch?

A. Do you mean feet?

Q. Yes.

A. Between 22nd and 23rd street, I don't know; I suppose 125 feet—that is, from the west side.

Q. You wouldn't know they were coming until they were within 100 feet or more from the building?

A. No; I think not; that would be an estimate of it.

Cross-examination by Mr. PORTIS:

Q. What do you say your position is there?

A. Bill clerk.

Q. How long have you been that?

A. Since 1886.

Q. Did you state what proportion of the goods were shipped by wagon and what by cars?

A. No, sir; I did not.

Q. Can you state?

A. Yes, sir.

Q. You are bill clerk, you ought to know?

A. I know what goes on, I guess. Do you want me to state?

Q. Yes, sir; if you know.

A. Do you want to know how much goes out by cars or comes in?

Q. Both.

A. Most all our goods come in by cars, and quite a number of goods that are returned. In the last year we have had, I suppose, $\frac{1}{2}\frac{}{5}$ of our goods come in by wagon.

Q. And the other $\frac{2}{2}\frac{4}{5}$ come in by car?

A. Yes, sir.

Q. Now, how about the going out?

A. About a quarter of the goods go out by wagons.

Q. And three-quarters go out by cars?

A. No. What is your question, please?

Q. You said a quarter went out by wagon, and the other three-quarters go out how?

A. I made a mistake there. I meant to say more of our goods go out by wagon than by cars.

Q. How much?

A. About three-quarters.

Q. Do you mean to say three-quarters go out by wagon
83 and one-quarter by car?

A. Yes, sir.

Q. You say the distance from a point in front of the building there to where you can first see a locomotive coming on to that switch or track is 125 feet only?

A. That is to the best of my judgment. I never measured it.

Q. Where does that track leave the main track of the Missouri Pacific?

A. About, I should say, 50 feet this side of 23rd street.

Q. Can't you see a locomotive as soon as it leaves the main track and comes on that track?

A. No, sir; not from our door you cannot.

Q. I didn't say from you- door, I said a point out in the middle of the street in front of your door?

A. I don't think you can see that either.

Q. Why?

A. Because there is quite a slant there and a curve. I never tried. I could not say positively as to that.

Q. What is the distance from a point opposite the door on Gratiot street, in the center of the street, to where the track leaves the main track of the Missouri Pacific at 23rd street—a whole block, isn't it?

A. No, sir; I think it comes in a considerable distance this side of 23rd street.

Q. Fifty feet less?

A. About that.

Q. Fifty feet off from a block—that is, 300 feet—isn't it?

A. Yes, sir.

Q. That would leave 250 feet; if you take 50 feet off from the other side it would still leave you 200 feet?

A. You asked me from the place I could see.

Mr. PORTIS: I was only testing your recollection about the distance.

Redirect examination by Mr. MILLS:

Q. It is a fact when that switch leaves the main track of the Missouri Pacific it curves inward?

A. Yes, sir.

84 This was all the evidence introduced on the part of the plaintiff in chief.

Defendant, to sustain the issues on its part, offered evidence as follows:

Defendant's counsel offered in evidence a certified copy of city ordinance No. 13897, and the same was marked Exhibit No. 1.

J. B. CLEMENTS, sworn for defendant, testified as follows:

Direct examination by Mr. PIKE:

Q. You are acquainted with the property in controversy here?

A. Yes, sir.

Q. I will get you to state what that is you have in your hand.

A. This is a map representing the location of the track running to the Southern Wire Company's mills from the Missouri Pacific tracks on 23rd and Gratiot street.

Q. I will get you to state if that is a correct representation of the location of the tracks there and the location of the Osborne property and the distance of the track from the curb, etc.

A. Yes, sir; this map is correct. To the best of my knowledge it shows correctly the location of the different properties and the location of the switch.

Q. What had you to do with the location of the switch?

A. I had it located.

Q. You know that map to be correct?

A. I know the map to be correct; yes, sir.

Defendant's counsel offered the map referred to in evidence, and the same was marked Exhibit No. 2.

By the COURT:

Q. That line you have drawn through the street, I suppose that represents the center line of the track?
A. The center line of the track; yes, sir.

85 Cross-examination by Mr. MILLS:

Q. How wide is the track, standard gauge?
A. Standard gauge; 4 feet 8½ inches.
Q. How far do the ties project from the rail?
A. The ties are 8 feet long; take 4 feet 8½ inches out of that and the difference will be the projection on each side.

By Mr. PIKE:

Q. What is the condition of that track there?
A. That track is in good condition.

Plaintiff's counsel objected to the question as immaterial.

Q. What is the condition of it as regards the street?
A. The track is even——

Plaintiff's counsel objected to this testimony as immaterial. Objection sustained.

WILLIAM F. FOLEY, sworn for the defendant, testified as follows:

Direct examination by Mr. PIKE:

Q. You are connected with the Missouri Pacific Railway Company?
A. Yes, sir.
Q. What is your position?
A. Assistant yard master.
Q. Where?
A. At 21st street.
Q. Do you know this D. M. Osborne & Co. property?
A. Yes, sir; I know where it stands.
Q. Do you know that switch there?
A. You mean the Gratiot-street switch?
Q. Yes.
A. Yes, sir.
Q. How long has that switch been down there?
A. I think it was put down some time in March, 1887; I have no positive recollection.
Q. How long have you been connected with that railroad?
A. In my present position, about nine months; not quite nine months.
Q. How long is that switch?
86 A. Well, it runs from a point where it connects with the main track, about opposite 23rd street, I should judge, to 200 feet east of 21st street—that is, taking the curb into consideration, too, where it goes around the St. Louis wire mill.

Q. Now, what do you know about the number of cars that pass on that track a day?

A. Since I have been there I think it will average three or four cars a day.

Q. Where do the cars go to, and where do they come from?

A. The cars are delivered to us by the bridge & tunnel company.

Q. To what place do they go, I mean?

A. To this wire mill, inside of their building.

Q. Do you have any particular time in which you handle those cars that go in there?

A. We handle them, as a general thing, between nine and 11 o'clock in the forenoon.

Q. You say, as a general thing. What do you mean by that?

A. We handle them that time unless there is some accident, so that we cannot get in there. Unless there is something to delay us, to keep us from going in there, we always go in there in the forenoon.

Q. Do you take in and out of there any other cars except those that belong to the wire mill company?

A. No, sir.

Q. Do any cars stand on the track there?

A. No, sir.

Q. I will get you to state what you know in reference to D. M. Osborne and Co.'s property, as to the loading and unloading of agricultural implements from wagons there on Gratiot street. Where is that sort of business generally done?

A. I never have seen any wagons load or unload on Gratiot street, in front of D. M. Osborne & Co.'s place.

Q. Where do you see the wagons go to?

A. I always see them loading and unloading their wagons on 22nd street.

Q. What is to prevent their loading or unloading wagons on Gratiot street at any other time than during the time the
87 cars are there?

A. No, sir; there is nothing in the way there.

Q. You say, as a general thing, with few exceptions, the cars are taken out and in there between 9 and 11 o'clock. The balance of the time there is nothing to prevent wagons loading and unloading in front of their property on Gratiot street?

A. I will say that it is not over four times in nine months that we have been on that switch in the afternoon with a locomotive.

Q. How much business have you seen done there by wagons at their establishment?

A. D. M. Osborne & Co.?

Q. Yes.

A. They do considerable business with wagons in their busy season. I think their busy season is from late in the spring to the first part of August or rather the latter part of August.

Q. How many entrances have they got on 22nd street?

A. I think they have two.

Q. How long have you known that street there?

A. I have known it ever since I have been connected with the Missouri Pacific railroad in St. Louis; that is two years the 12th of last July.

Q. I will get you to state what obstruction that track presents, if any, to the passage of teams along that street.

A. What obstruction the track presents?

Q. The track itself and the business done on the track, how much does that obstruct the travel?

A. Well, in regard to the time, it is not over 20 or 30 or 35 minutes in a day.

Q. Suppose there are cars on the track there, can wagons pass along?

A. The wagons could pass between the curb and the car.

Q. What is the distance between the rails and the curb on either side?

A. I think it is about eight feet.

Q. And an ordinary wagon or team is how wide?

A. I should think the bed of a truck wagon was about five feet wide.

88 Q. What do you know about the amount of travel done upon that street?

A. I don't know a great deal about the amount of travel. I don't travel any on that street myself except in going to and from the wire mill.

Q. I will get you to state if that track obstructs travel at all on that street, as far as you have observed.

A. No, sir; I can't say that the track obstructs the travel any.

Q. You say the cars take up only thirty or thirty-five minutes a day?

A. That is all. We have to pull the empties out.

Q. Are you in the habit of taking cars in the afternoon from the wire mill or using that track in the afternoon at all?

A. No, sir.

Q. Under whose control is that yard there?

A. The yard?

Q. I mean the track.

A. It is under the control of the Missouri Pacific; it is under my control while I am on duty.

Q. You are on duty there during the day, are you?

A. Yes, sir.

Cross-examination by Mr. MILLS:

Q. What hours of the day are you on duty?

A. From 7 a. m. until 6 p. m.

Q. How far does your yard extend?

A. Well, I have control of the movement of engines and trains between 18th street and Ewing avenue.

Q. You don't spend all your time supervising matters on the Gratiot-street switch?

A. I supervise it whenever we go there.

Q. You don't travel on that street yourself except when you are going and coming?

A. When business calls me there.

Q. And you do your travelling on the engine?

A. Most of the time when I go there I go on the engine. Sometimes I walk along there between 21st and 22nd streets.

Q. Don't you carry coal into the wire mill?

A. No, sir.

Q. Have you carried any flat cars in there?

89 A. Here—some time ago the company done some work there, letting the track down there, and some surface dirt was in the street, and cars were put in there for men to haul that dirt out of the way.

Q. That is when you were lowering the track?

A. Yes, sir.

Q. About three weeks ago?

A. Nearer three months than three weeks. I couldn't tell you the exact date.

Q. You have been in that yard, haven't you, since the last nine months?

A. Yes, sir; at my present position. I have been employed in the yard ever since the 12th of July, two years ago.

Q. But did you have charge of the movement of trains before the time, nine months ago?

A. No, sir; not at that time, of the movement of trains. I was assistant yardmaster at night.

Q. Then your knowledge about the running of trains on Gratiot street is based on during the time you have been working there in the daytime?

A. Yes, sir.

Q. Which is within nine months past?

A. Yes, sir.

Q. You say they are limited to three or four cars a day?

A. That is about the limit. What I mean by that is they receive about that much in there on an average, three or four cars a day.

Q. Do you take three cars in and bring them back or take them separately?

A. We take them in separately. You see, we have to go in there with a light engine, if there are any empty cars, and take them out. We make the trip with a light engine and take them out, and then we take the loaded cars and go down with them separately.

Q. Then you make two trips each way?

A. We make two round trips to complete the switch.

Q. Don't you sometimes switch twice in a day?

A. Well, very seldom.

Q. You do occasionally?

A. Well, very seldom.

Q. But you do occasionally.

90 A. I assure you, very seldom; not once in three months.

I don't think positively not more than once or twice in three months that we make two switches a day in there.

Q. You say if something does not delay you you go in in the morning?

A. Whenever the wire-mill people call on us for a switch, it is in the morning that they always call on us. If they don't call on us we don't go at all; frequently there is a day we don't go in there at all.

Q. Don't you haul coke for the company?

A. No, sir.

Q. Or coal?

A. No, sir.

Q. No fuel whatever?

A. No, sir.

Q. What do you haul?

A. Wire and empty nail kegs.

Q. The cars that you go in there with are loaded with wire and empty nail kegs?

A. Yes, sir.

Q. What comes out?

A. Once in a great while they may load a car to be shipped west, but the principal part of the loading is done on the outside.

Q. Whenever they notify you you switch in or out?

A. Yes, sir; they always notify us in the morning if they want a switch, and if they do not do so we don't switch them at all.

Q. As far as you know, you have never seen wagons loading at Osborne's place on Gratiot street at all?

A. No, sir.

Q. Always on 22nd street?

A. Yes, sir.

—— FIELD, sworn for defendant, testified as follows:

Direct examination by Mr. PIKE:

Q. You live here in the city?

A. Yes, sir.

Q. You are a porter connected with this Gratiot-street switch?

A. Yes, sir.

Q. How long have you been in the employ of the Missouri Pacific railroad?

A. Eight years.

Q. Where do you stay down there—at Gratiot street?

A. At the division superintendent's office—L. D. Hopkins.

91 Q. How far is that from the Gratiot-street switch—how many blocks?

A. We are right on the switch.

Q. You are on Gratiot and 23rd street?

A. Yes, sir.

Q. Where does that switch leave Gratiot street; how far from where your office is?

A. It comes in at 23rd street and goes out about 23 or 24 feet east of 21st street.

Q. What do you do there?

A. I am a porter—general porter.

Q. In Mr. Hopkins' office?

A. Yes, sir.

Q. What do you know about the number of cars on this track? Are you there all the time?

A. I am there most of the time; yes, sir.

Q. Were you there before the track was put there?

A. Yes, sir.

Q. I will get you to state how many cars go in, generally, on that switch every day and how many come out on an average.

A. Three each way. A light engine goes up and gets three cars and brings out from the wire mill of a morning, between nine and eleven o'clock, and they take three back—three or four back.

Q. What is the time that they do that?

A. In between nine and eleven o'clock generally.

Q. Do they occupy that switch at any other time?

A. No, sir; sometimes they do in the afternoon when they don't do it in the morning.

Q. How often does it occur that they don't use that switch—that is, between nine and eleven o'clock in the morning?

A. I should judge once or twice in two or three months; probably not so often.

Q. Where do D. M. Osborne & Co. load and unload their implements into wagons—at what point?

A. 22nd street since I have been there.

Q. Have you seen them loading and unloading on Gratiot street?

A. More since the track was constructed than before.

92 Q. What prevented them using the Gratiot-street front when the cars were not running forward and backward?

A. It was not their usual loading place.

Q. Is there anything to prevent their using that front?

A. No, sir.

Q. Outside of these two hours?

A. No, sir.

Q. How long does it take to go in there and take out cars and put in cars—generally how long?

A. Well, I don't know.

Q. What part of that two hours between nine and eleven o'clock do they occupy in going in and coming out?

A. I judge about half an hour.

Q. Where did D. M. Osborne & Co. load and unload their wagons before the track was put in?

A. At 22nd street.

Q. The same place that they do now?

A. Yes, sir; it is handier.

Q. That was before the track was put down there?

A. Yes, sir.

Cross-examination by Mr. MILLS:

Q. You say you are the porter. Do your duties occupy you in the office?

A. Yes, sir; I am porter, and I call the freight crews. I am, though, in and out of that office every hour in the day. I notify the crews when they are to go out as extras when they don't know it themselves.

Q. In what direction do you have to go?

A. In different directions; some live east, some west, some north, and some south, in the city.

Q. How many of those men live on Gratiot street between 21st and 23rd?

A. I have not got the list exactly. I know of ten or more that live on Gratiot street.

Q. Between 21st and 23rd?

A. No; between 18th and 21st—between 18th and 23rd.

Q. How many are there between 21st and 23rd?

93 A. Three that I know of between 23rd and 22nd.

Q. How long have they lived there?

A. About four or five years, I guess.

Q. Can you see Osborne's office from the office where you are employed?

A. I can; yes, sir. I can see the track. I can see the track that passes in front of Osborne's from our office between 21st and 22nd.

Q. Please look at the map and tell me where your office is located.

A. (Referring to plat.) My office is right in here, 2217.

Q. Your office, then, is alongside of the tracks that go on the north side of Osborne's building?

A. My office is on the north side of the track of Mr. Osborne's building; yes, sir; but on the north side of Gratiot street.

Q. From where your office is you cannot see the front of Osborne's building?

A. I can see the Gratiot-street building, because my office where I stay—my call-room—is on Gratiot street.

Q. Can you see the front of Osborne's building from your office?

A. What front do you mean—the Gratiot-street front?

Q. The Gratiot-street front.

A. I can see the track.

Q. Can you see the front of the building?

A. No. I can see the track.

Q. You can see the west side of the building?

A. Yes, sir; I can see the side of the building on the south side of Gratiot street, and I can see the west part of the building.

Q. How far is that office from the line of Gratiot street?

A. We are right on the line—right on the sidewalk. Here is Gratiot street (indicating).

Q. Please point out on the map where your office is.

A. Is this the track? Is that Osborne's?

Q. Yes.

A. Here is Mr. Osborne's; here is the vacant lot; here are a few

little tenement buildings in here, and our office is right here (indicating).

94 Q. Isn't your office at the north of this Gratiot-street switch?

A. On the same side that Osborne's is.

Q. Don't you know there is no window on the side of your office towards Osborne's building?

A. No window at all.

Q. Look at this map and see if the building in which you are situated—is this a two-story building?

A. Yes, sir.

Q. How can you from there see the front of this building?

A. Most of the time I am sitting right on the steps.

Q. The front steps?

A. The steps on Gratiot street. Other times I am sitting in my office, where I can see the Gratiot-street dwellings. I am out of the office, I will say, every two hours in the day. I am always frequently visiting that corner of 23rd street and calling crews. I go across the main track, across the Gratiot-street track, and across 23rd street, and all through there.

Q. Is there any window on the east side of the two-story building in which you have your office?

A. There is only one, and that is upstairs; one window; yes, sir.

Q. You say they do more loading on Gratiot street now than before the track was put there?

A. I have never seen any done elsewhere except on 22nd street.

Q. I thought you said they did more on Gratiot street than before?

A. I never seen them load on Gratiot street before the track was laid.

Q. How many wagons have you seen there since that?

A. Two country wagons, two hay wagons, larger wagons; they come in 22nd street; they are large wagons. The doors look as if put there for that purpose.

Q. I understand the only wagons you have ever seen in front of that place on Gratiot street are two hay wagons?

A. Two little country wagons.

Q. Were they loading or unloading?

95 A. Not doing either. I don't know whether they were going in to buy or not, but they were empty country wagons.

Q. Standing in front there?

A. Yes, sir.

Q. That is all you have seen in the last two years?

A. Yes, sir.

JOHN H. TERRY, sworn for defendant, testified as follows:

Direct examination by Mr. PORTIS:

Q. You reside in St. Louis?

A. Yes, sir.
Q. How long have you resided here?
A. Twenty-two years.
Q. What is your occupation?
A. Real estate.
Q. How long have you been engaged in that business?
A. Nine years.
Q. Are you familiar with the locality in question here—22nd and Gratiot street—in the city of St. Louis?
A. Yes, sir.
Q. Do you know the property of D. M. Osborne & Co. there?
A. Yes, sir.
Q. Are you familiar with Gratiot street?
A. Yes, sir.
Q. And the railroad track located therein?
A. I am familiar with that portion of the city since last August. I have been by there perhaps four times a week—average that. I have business there that calls me right near it, and I have been there very often.
Q. How did you go—on foot, on horseback, or in a carriage?
A. I go mostly in a carriage.
Q. Pass over Gratiot street?
A. Yes, sir.
Q. At D. M. Osborne & Company's works?
A. Yes, sir.
Q. Were you acquainted with that locality before that track was located there?
A. Yes, sir.
Q. Prior to March 20th, 1887?
A. Yes, sir.
Q. Were you acquainted with the value of that property prior to that time, and are you acquainted with it now?
96 A. I am acquainted with it now. I am better informed now than I was at that time, although I knew at the time, in a general way, what the values were.
Q. Prior to that time and subsequently have you been acquainted with other property in that locality around about there?
A. Yes, sir.
Q. Will you please state what, in your opinion, that property in that locality is best adapted for?
A. Manufacturing and railroad purposes.
Q. Any other purposes?
A. Well, I think the future of that property is railroads—to be used for railroads.
Q. How is it, in your opinion, adapted to warehouse or storage purposes?
A. It is good where they have railroad connections—railroad switches.
Q. Will you please state to the court, in your opinion, whether or not the location and operation of that switch track over Gratiot

street in front of the property of D. M. Osborne & Company has decreased or enhanced the value of that particular property?

A. Well, I should say as a real-estate man, to handle that property, it had enhanced it very much.

Q. Will you please state why?

A. Because it is in better condition for handling goods than it would be without the track. It would sell better and rent better, in my opinion, with the track there.

Q. I speak of the market value, of course.

A. Yes, sir.

Q. That is what you have reference to?

A. Yes, sir.

Cross-examination by Mr. MILLS:

Q. You understand that there are nine tracks to the north of this property—nine railroad tracks?

—. I know there are a number. I don't know how many.

Q. And that there are switches there on the north of the property; you understand that, do you not?

A. Yes, sir.

97 Q. Do you think it enhances the value of property to have a railroad track on four different sides of it?

A. If it was my property I would think so.

Q. You would have a switch on all four sides?

A. Yes, sir; and all through it.

Q. Are those tracks within eight feet of the curb?

A. Yes, sir.

Q. And the street is only 24 feet wide?

A. Yes, sir; there is plenty of room to drive along there between the track and the curbstone; there is no trouble about that.

Q. You have done that?

A. Yes, sir; a hundred times.

Q. At what hours of the day?

A. All hours—early and late.

Q. You have noticed the vacant piece of property there—the property west of the Osborne building—the property that is marked green on this map?

A. Yes, sir.

Q. You understand that the railroad track cuts the curb about the corner of that property?

A. Yes, sir.

Q. Now, I would like to know what access that property—this vacant property, for instance—has for wagons or vehicles, considering the fact that the railroad property bounds it on the west, the railroad tracks on the north, and the railroad track that cuts the curb on the south.

A. I do not see the force of your question, Mr. Mills.

Q. What access has that property—what convenient access is there to that property for vehicles or wagons?

A. I do not know the exact number of feet and inches. I know that property, and I know it is accessible for wagons—perfectly.

Q. You said that is valuable for railroad purposes. Do you not mean by that for the purposes of the Missouri Pacific railroad?

A. That is the future for all of that property, in my opinion.

Q. To be abandoned for all other purposes?

98 A. Because it will be worth more to railroads than other parties.

Q. That has ceased to be useful for other purposes?

Mr. PORTIS: He don't say that, as I understand it.

The WITNESS: If they require that they could pay more for it than to hold it for warehouse purposes or manufacturing purposes.

Q. Did you have any interest in the passage of this ordinance?

A. No, sir.

Q. Did you take any steps to assist in the passage of it?

A. No, sir.

Defendant's counsel objected to this testimony as immaterial. Objection sustained.

The WITNESS: I have a block on the west. I would like to get a switch on that block if I could.

Redirect examination by Mr. PORTIS:

Q. Do you own property out it that territory?

A. Yes, sir.

Q. How far from this Osborne property?

Plaintiff's counsel objected to the question as immaterial. Objection sustained.

J. M. CARPENTER, sworn for defendant, testified as follows:

Direct examination by Mr. PORTIS:

Q. You reside in St. Louis?

A. Yes, sir.

Q. How long have you resided here?

A. Thirty-eight years.

Q. What has been your business?

A. Real-estate business.

Q. All that time?

A. Yes, sir; nearly all of it—thirty-six years of it.

Q. Are you familiar with the value and location of property in the city of St. Louis?

A. Yes, sir.

Q. Generally?

A. Yes, sir.

Q. Are you familiar with this property in question here—22nd and Gratiot street-?

A. I am.

99 Q. Known as the D. M. Osborne & Company property?

A. Well, with the property on Gratiot street down to the wire mill. I used to own some property near the wire mill.

Q. I speak now of the building of D. M. Osborne & Company, on the corner of Gratiot and 22nd streets—just that.

A. I have seen it.

Q. You know where it is?

A. I have seen it often.

Q. Were you acquainted with the locality there and the values of property prior to March, 1887, when the track in question was located there?

A. Yes, sir.

Q. And have you been acquainted with it ever since?

A. Yes, sir.

Q. Can you state, as a real-estate man, your opinion as to whether or not the location of that track in Gratiot street, as shown by that map, and as you have heard it described here, running along in front of D. M. Osborne & Company's property, has increased or depreciated its value, in your opinion?

A. In my judgment, it has largely increased it.

Q. Please state why.

A. Because the property is almost valueless as dwelling property, which it was prior to this track being put there. It is now desirable as manufacturing and warehouse property, and hence has largely increased in market value.

Q. Do you own property near there?

A. I do not now. I have sold what I held.

Q. When did you sell it?

A. About a year and a half ago.

Q. Have you traveled over that street since the track has been located there?

A. At 21st street—yes, sir; frequently.

Q. At 22nd street on Gratiot?

A. I don't recollect to have crossed there.

Q. Was the track in that part of Gratiot street where you did travel?

A. Yes, sir; I have crossed there since the track was put there.

100 Q. You don't remember to have traveled in front of D. M. Osborne & Company's?

A. No, sir; I don't recollect to have gone right by their factory.

Cross-examination by Mr. MILLS:

Q. You sold your property?

A. Yes, sir.

Q. Was it residence property?

A. Yes, sir.

Q. The track rendered that property undesirable for residence property?

A. I think so; yes, sir.

Q. Did you sell your property to the railroad?

A. No, sir; mine was not right on Gratiot street; it was on the next street south.

Defendant's counsel objected to this testimony. Objection overruled.

Q. Do you think the construction of that track, when you consider the fact that there are nine tracks to the north of it, has rendered this particular property undesirable for the purposes for which the property was built, for which the building was built?

A. It was built for an agricultural warehouse.

Q. Agricultural machinery—distributing and receiving?

A. I don't know what its means of access, independent of the tracks, are sufficiently to answer that question, unless you show me on the plat, so that I can see fit.

Q. Suppose on the north side of the building there is a private switch extending the whole length of the warehouse and also of the vacant lot used for shipping purposes in car-load lots; suppose the switch, starting from 23rd street, cuts the curb in front of the vacant property, leaving no street line there, then passes down through the center of the street, past the warehouse property, state, then, whether or not the construction of that switch in the street, the property having sufficient switching facilities, has had any tendency to increase the value of the property.

A. Having all this track here, I don't think this switch did
101 this piece of property any good, but I don't think it did any harm, for the reason it has plenty of facilities here. It has 147 feet on 22nd street that is not obstructed by a track.

Q. Is it not true that this vacant property, which has a solid brick wall to the west, has been depreciated by the fact that it is bounded on the north by tracks, on the west by railroad property, and on the south by this switch, which crosses the curb at this point and is within eight feet of the curb at the east line of the vacant lot, with no outlet except on Gratiot street? I ask you now if that property has not been damaged by the construction of this switch in front of it.

A. It certainly has not benefitted this vacant lot here. If I owned it, having this track here and this angle, I would rather not have this track come right up to the curb; but, as a general proposition, I think the more switching facilities you can get to a piece of property, where it does not prohibit your ingress or egress by other means, it is a benefit to the property.

Q. I will ask you whether or not the egress and ingress to this property—speaking of the vacant lot—has not been damaged by constructing this track with a curve, so that it runs into the curb at this point.

A. I don't know that it has been hurt. If there is anything by which you cannot use this, it is easy to do your shipping here and here (indicating), and ship from this side, or, if you are crowded with work, you can ship from both sides.

Q. Suppose this switch is not under the control of the persons owning this warehouse property, but is under the control of parties farther on, and the running of these trains is irregular, without any certainty as to when they run or how fast, I will ask you if a switch

made under such circumstances does not operate as a damage on that property.

A. Well, if there is no control to it, of course you could not drive across here at all hours. If the trains were running at all
102 hours, they can't both be used at the same time. This is a narrow street, and it is not safe to drive up and down when the cars are running, as a matter of course.

Q. Suppose the cars are run without regularity and without warning, and from a point west of here they cannot be seen from in front of the premises, wouldn't that operate as an additional damage?

A. Of course cars and wagon traffic cannot be both used at the same time, but I take it the purpose of Osborne's location there is to get between the tracks or as close to them as possible. I reckon that is why they paid a big price for their property, in order to get switch facilities. It may have given it too much.

Q. When you speak of this property being enhanced by having access to the track, you mean if it is close to it?

A. All property made accessible to switch tracks is enhanced thereby in St. Louis, I don't care where.

Q. Nor how the switch is constructed or managed?

A. Oh, of course you have to exercise good sense in all things—proper management.

Q. That is entirely useless now for residence purposes?

A. I think so; yes, sir. I wouldn't give you anything for it for dwelling purposes. That is the reason I sold mine over there, because I could not get a switch to it.

Q. But you had no switch on either side?

A. No, sir.

Q. You did not have nine tracks on one side?

A. No, sir.

Redirect examination by Mr. PORTIS:

Q. Suppose these parties could get a side track run into any part of their property there, and controlled it themselves entirely, wouldn't that change it?

A. I think so. That property could be split in two, and could switch from both sides.

Q. I understand you to say if it does not benefit it it does not injure it. I will ask you if it is not a fact that the con-
103 struction of that track or any track has the effect to increase the market value of that property in that locality.

A. I think so, decidedly.

Q. Instead of being damaged it has actually been a benefit to the market value of that property?

A. In that district.

Q. Including this?

A. Including this property. I don't think it has benefitted this (indicating).

Q. If the market value of all property——

A. You asked me a specific point.

Q. I ask you generally.

A. You said right here where it runs into the curbstone.

Q. I ask you generally if the building of this track enhanced the value of all the property in this locality, did it not include this also to some extent?

A. The general property; yes, sir.

By Mr. MILLS:

Q. But you say the vacant lot has been unfavorably affected by having it cut the curb at that point.

A. Of course I would rather have property where you can have means of access both ways, both wagon traffic and rail traffic, rather than have only one. I think that track goes too close to the corner to be of any good.

Q. When you say all that property has been enhanced in value you speak only of residence property.

A. The whole property, whether vacant or residence, has been largely enhanced, all that district, by means of access for shipment.

MARCUS A. WOLFF, sworn for the defendant, testified as follows:

Direct examination by Mr. PORTIS:

Q. How long have you lived in the city of St. Louis?

A. Forty-five years.

Q. What has been your business?

104 A. For the last thirty years I have been in the real-estate business.

Q. Are you familiar with the location and value of real estate generally in the city of St. Louis?

A. I think I am.

Q. Are you familiar with the location and value of the property around about Gratiot street and 22nd, in the city of St. Louis?

A. I am.

Q. Do you know the property in question—what is known as the property of D. M. Osborne & Co., on 22nd and Gratiot street-? Perhaps if you let Mr. Wolff have that map he can tell better about it. That map shows the locality of the property of D. M. Osborne & Co., on the corner of Gratiot and 22nd streets, and the location of the switch track in question, extending from 23rd street, from the Missouri Pacific main track, east on Gratiot street, and crossing 22nd street in front of D. M. Osborne & Co.'s building and going down to the St. Louis wire works, on 21st street.

A. I know the property.

Q. Were you acquainted with the value of property in that locality prior to March, 1887, when that track was located in Gratiot street?

A. I think I was.

Q. Have you been acquainted with it since?

A. I have.

Q. Now, will you please state, as a real-estate man, your knowledge of the locality and value of the property there; if the location, maintenance, and operation of that switch along and through Gratiot street as shown on that map has decreased or enhanced the value of that property on the corner of 22nd and Gratiot street-?

A. I think unquestionably it has enhanced the value of it.

Q. Please state why you think so.

A. Because it is no place for residence or business purposes; it is simply designed for warehouse and manufacturing purposes, and the contiguity to the railroad enhances its value, in my opinion.

Cross-examination by Mr. MILLS:

105 Q. If that property had prior to March, 1887, nine tracks on the north side of it and a private switch along the whole north side of the building, in what manner would it enhance its value to have another switch on the south side of the building?

A. I can only give you my opinion about the matter. I think the more railroad communication you can get with a lot for manufacturing purposes the more desirable the lot becomes.

Q. If you had a switch and tracks on all four sides of the building it would be better?

A. I think so. I think if you had them on two sides and you could get two more it would enhance their value.

Q. And if you had one running through it?

A. I won't go that far. The more you can surround it with railroad tracks the better.

Q. Each one of those tracks would add to its value?

A. I think so.

Q. Do you not consider that a building for the distribution and receiving of agricultural machinery requires facilities for handling goods by wagons or trucks or drays?

A. Unquestionably.

Q. If access to the building was interfered with by the construction of tracks on four sides of it, so that there would not be easy access by drays and wagons, wouldn't that be a detriment to the property instead of a benefit?

A. If you cut off communication by drayage it would be a detriment.

Q. If you interfere it would be a detriment to the extent it was interfered with?

A. Yes, sir.

Q. You have seen this building, have you?

A. I have examined it with the view of testifying here.

Q. It is constructed especially for the purpose of receiving and discharging agricultural implements, isn't it?

A. Yes, sir.

Q. Adapted to that purpose, and it has for the discharge in the rear by car-load lots a switch that occupies the whole north
106 side of it?

A. That is my understanding of the case.

Q. And the south side of it, the south front, and the 22nd-street front is for receiving and discharging articles by wagons or by drayage?

A. Yes, sir.

Q. You say you consider it is enhanced in value by having the Gratiot-street front obstructed by this switch so that wagons cannot use it?

A. I want to make myself understood. I think the more railroad communications you can get to a manufacturing lot the more valuable that lot becomes. If you cut off its communication by wagons of course that is a detriment to the property.

Q. Is that used as a manufacturing house?

A. I consider it manufacturing property.

Q. You consider it better adapted for manufacturing purposes than it is for handling agricultural implements?

A. Manufacturing or warehouse purposes. It is not the place for a business, no place for a dry-goods house or a dwelling-house.

Q. Or a wholesale grocery?

A. No, sir; simply a manufacturing lot or warehouse lot.

Q. Why is it not good for a wholesale dry-goods or grocery house?

A. Nobody would go there to buy goods.

Q. Is it not especially adapted for handling agricultural machinery?

A. Yes, sir; it is adapted for that purpose or any business of that kind.

Q. You think that such a track might interfere with it for discharging or receiving agricultural machinery, but would not interfere with it so much for use for manufacturing or warehouse purposes simply?

A. I don't know that I thoroughly understand your question.

Q. You speak about this property being in its present condition particularly adapted to manufacturing or warehouse purposes?

A. It is good for nothing else.

107 Q. Then it is not fit for receiving and discharging agricultural machinery and carrying on the business that D. M. Osborne & Co. are now carrying on?

A. I think it is well fitted for that because they have railroad communications and can receive and discharge goods there.

Q. Suppose D. M. Osborne & Co. send out or distribute three-quarters of their goods or freight by wagons, and suppose they have all the railroad facilities in the rear by their private switch that they want or that they could by any possibility use, would, then, the construction of a switch in front of them which they did not use and would not need to use benefit their property or benefit them to any extent?

A. I think a house of that kind would want facilities to send their goods out by wagons if they want to. If you cut that communication off I think it would injure the property.

Q. In reference to the vacant lot, shaded green (indicating) here, considering that fact that this lot has in the rear of it a private switch along the whole north side of it, and that on the south side

of it is the railroad track, which is eight feet from the curb at the eastern corner and runs into the curb at the western corner, I will ask you whether the construction of that track in the street has benefitted or diminished the value of that property.

A. I think any railroad communication with a lot of that kind is advantageous to the property, notwithstanding they have a northern communication here (indicating). They may want to ship on another road here (indicating).

Q. Suppose they desire to have free wagon communication and this track cuts off the wagon track in front, so that for one-half of the front of the road a wagon cannot stand between the curb and track, but partly on the curb and partly on the track?

A. If I understand it the construction of this road would cut them off from the wagon road.

108 Q. It is right this way (indicating). Are you familiar with the operation of that switch on Gratiot street?

A. I am not.

Q. Do you know that switch is already laid on Gratiot street?

A. I have so heard.

Q. You have not seen it?

A. No, sir.

Q. Your testimony in this matter is based on the general belief that railroad tracks enhance the value of the property and not from any inspection of this property?

A. Theoretically.

Q. Did you also base your remarks on the theory that this switch or track on the south side was of a different road or company from the one or the north side?

A. No; I understood there was a road on the north side, and I supposed, but I did not understand, that this road on the south side would take this property out of the wagon track.

Q. Did you understand that it cut the curb—that the track itself cut the curb in front of the property?

A. I did not.

Q. And you have never seen the property itself?

A. No, sir.

Redirect examination by Mr. PORTIS:

Q. Do you think that the fact of that track being along Gratiot street, at grade with the street, would necessarily prevent access and egress to and from it by wagons and the loading of wagons along there?

A. I do not think it would, sir.

Q. The testimony here shows that the front of that property of D. M. Osborne & Co. on Gratiot street is 86 feet, in front of which is this track; that the same property fronts on 22nd street 120-odd feet, and that there are two doors from which wagons are loaded. I would ask you if that is not sufficient wagon-loading privileges for property like that.

A. Why, I should say unquestionably it is—plenty of room.

Q. You are familiar with railroad tracks, the movement of cars, and all that. I will ask you, as a matter of fact, if a track
109 located like that, on which three or four cars moved in a day, occupying that track not exceeding half an hour during the entire 24 hours, would obstruct that street or access to and from that property so as to damage it.

A. I should say no.

By Mr. MILLS:

Q. You are familiar with the Poplar-street track?

A. Yes, sir.

Q. Do you mean to say that increases the value of property on that street?

Defendant's counsel objected to the question as immaterial.

The COURT: I cannot go into the trial of that question, how it affects Poplar street. The inquiry will be immaterial, because the witness might say it did not affect the value of Poplar-street property, and I would have to try that. It simply comes down to a matter of opinion of this witness and other witnesses as to what would be the effect on the value of the property which is passed by cars, situated as this property is, so many times during a day.

By Mr MILLS:

Q. I will ask just one question. Suppose this track was not made for the benefit of this particular adjoining property, but for parties further on, and the track was used by shifting cars back and forth at uncertain times during the day, would that enhance the value of the property?

A. I don't think it would.

Q. Would it not be a detriment to the property to have cars going back and forth in front of that property without any track connection with it?

A. If you shifted cars back and forth *ad libitum*, I think it would be a detriment.

C. H. SHOLER, sworn for the defendant, testified as follows:

Direct examination by Mr. PORTIS:

Q. What is your name, residence, and occupation?

A. C. H. Sholer; 2805 Pine street; shipping clerk for the
110 St. Louis Wire Mill Company.

Q. How long have you been such?

A. Four years.

Q. Are you familiar with the movement of cars over the Gratiot-street track?

A. Yes, sir; I have charge of it. I order them in and out.

Q. Can you state the actual number of the cars—have you got a statement?

A. I have for January.

Q. Will you please state that?
A. 56.
Q. January this year?
A. Yes, sir.
Q. Including how many days?
A. Up to yesterday.
Q. Did you have cars every day?
A. No, sir; not every day; we have had about two for every day.
Q. How was it prior to January?
A. Well, we averaged three cars all last year; not over three.
Q. What times did those cars pass to and fro from your place?
A. Between nine and eleven o'clock.
Q. Is that always the case, or is it sometimes otherwise; and, if so, when?
A. It is always the case, with the exception of three or four times last year that we ordered them in in the afternoon.
Q. How much time is occupied each day by the passage of those cars to and fro?
A. A half an hour.
Q. Not over half an hour?
A. That is all.

By the COURT:

Q. When you say three cars daily what do you mean?
A. I mean that is the average.
Q. If you want some cars set in, the engine first comes in and takes the empty cars out?
A. Yes, sir.
Q. Then it comes back and brings in the loaded cars and runs back empty?
A. Yes, sir.
Q. Do you call that one car or four cars?
A. I have reference to the loaded cars. I am not speaking
111 of the unloaded cars. It would be six that way.
Q. You have reference to the number of loaded cars that come in on the switch?
A. Yes, sir; the average is about three cars a day for a run.

By Mr. PORTIS:

Q. This engine coming in for the empty cars is to make room, isn't it?
A. Yes, sir.

By Mr. MILLS:

Q. When you speak about 56 cars you speak of 56 loaded cars?
A. 56 loaded cars are run into the place.
Q. And 56 empty cars are taken out?
A. Yes, sir.
Q. How many do they take out at a time?
A. Whatever is in there; sometimes two and sometimes three.

Q. Prior to that time there were three loads came in there every day?

A. No; I say the average for last year was about three cars.

Q. Three loaded cars?

A. Three loaded cars; yes, sir.

By the COURT:

Q. Those three cars would not necessarily be set in each one separately?

A. No, sir; they run the whole three right back. No, sir; they are not run in separately. We can handle six cars on the switch; that is all we can handle.

Cross-examination by Mr. MILLS:

Q. What do you receive in those loaded cars?

A. Wire and empty kegs—empty nail kegs.

Q. Do you receive any coke or coal?

A. No, sir.

Q. Do you send out any loads?

A. Very seldom. I think there were about five cars last year. We do all our loading at the warehouse—that is, on the tracks.

Q. You say whenever you want any switching done you go and order it?

A. Yes, sir; of that man Foley that is here, and he brings them in.

112 Q. You have no set time to make those orders up, but when ready you go and order them?

A. Always nine o'clock. I cannot do anything until I get my cars in. He generally gets the order from me about eight o'clock in the morning, and he comes in between nine and eleven.

Q. How many times last year did you say you switched in in the afternoon?

A. About five times, switched in the afternoon. I don't think it was over three times.

Q. Did you ever switch twice a day?

A. Very seldom; about three times last year.

Q. Both forenoon and afternoon?

A. Forenoon and afternoon; yes, sir.

This was all the testimony introduced in the case.

113 And afterwards, to wit, on the eleventh day of March, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

Decree.

D. M. OSBORNE & Co., Complainant,
vs.
MISSOURI PACIFIC R'Y Co., Defendant. } 2775.

Now again come the parties, by their solicitors, and this cause having been heretofore submitted to the court and the court being

now fully advised thereof, it is ordered, adjudged, and decreed as follows, to wit:

1. That the bill of complaint herein be, and the same is hereby, dismissed without prejudice to the right of complainant to file an action at law.

2. That the complainant pay the costs to be taxed herein and that execution issue therefor.

And afterwards, to wit, on the fourteenth day of March, A. D. 1889, there was filed in said cause a motion for rehearing in words and figures following, to wit:

Motion for Rehearing.

In the Circuit Court of the United States for the Eastern District of Missouri, Eastern Division Thereof.

D. M. OSBORNE & Co., a Corporation, Complainants, *vs.* THE MISSOURI PACIFIC RAILWAY Co., Defendants. } In Equity. 2775.

Now comes the complainant herein and moves the court for a rehearing in this cause and for a modification of the decree, for the reasons following:

First. The court erred in finding that the damage done to
114 complainant's property in the way of lessening its market value is small or in finding as to the amount of damages at all, because the amount of the damage was not presented in evidence and from the ruling of the court could not have been presented.

Second. The court erred in declaring that complainant's right to equitable relief, which by the opinion of the court did exist at the time of the filing of the bill, had become extinquished at the time of the hearing of the cause, in the absence of any evidence that complainant had not pressed said cause to a hearing.

Third. The court erred in declaring the law to be that equitable relief can only be granted to those who give bond at a preliminary hearing and must be denied to those who submit their causes on final hearing.

Fourth. The court erred in holding that injunctive relief was not asked for seasonably in this case when such relief was asked for in the present bill, filed February 16th, 1887, and before the acts complained of were committed.

Fifth. The court erred in holding that right of complainant to sue for its damages at law excused the occupation of the street by defendant's track, and that the defendant may be permitted to occupy said street to the damage of complainant because the defendant cannot have a convenient proceeding on its part to obtain an assessment of the damages, when the provision of the constitution of the State of Missouri forbids all occupation and disturbance of the proprietary rights of abutting owners until the damages are assessed and paid.

Sixth. The court erred in holding that third parties can obtain any vested rights in trespasses committed by defendant or that the inconvenience to such third parties should have any weight in determining the rights of the parties hereto.

Seventh. The court erred in holding that the granting of
115 an injunctive order in this case was discretionary with the court.

Eighth. The court erred in denying injunctive relief and dismissing complainant's bill, for the reason that such action of the court was against the law and against the evidence and against equity and good conscience.

MILLS & FLITCRAFT,
Solicitors for Complainant.

And afterwards, to wit, on the twenty-first day of March, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

Motion for Rehearing Heard and Submitted.

D. M. OSBORNE & Co., Complainant,
vs.
MISSOURI PACIFIC RAILWAY Co., Defendant. } 2775.

Complainant's petition for rehearing, coming on to be heard, was argued by counsel and submitted.

And afterwards, to wit, on the twenty-second day of March, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

Motion for Rehearing Denied.

D. M. OSBORNE & Co., Complainant,
vs.
MISSOURI PACIFIC RAILWAY Co., Defendant. } 2775.

Complainant's petition for rehearing, heretofore submitted, having been considered by the court, it is ordered that said petition be and it is denied.

And afterwards, to wit, on the fifteenth day of June, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

116 *Appeal Allowed. Appeal Bond Approved.*

D. M. OSBORNE & COMPANY, Complainant,
vs.
MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } 2775.

Now comes the complainant, by solicitor, and, on motion, it is ordered that an appeal be allowed complainant from the decree of this court in this cause to the Supreme Court of the United States

on complainant's giving bond in the penal sum of five hundred dollars.

And thereupon complainant presents its bond in the penal sum of five hundred dollars, which is by the court approved and ordered to be filed and made part of the record herein; and it is further ordered that the clerk of this court make out and certify to the Supreme Court of the United States a full and complete transcript of the record and proceedings in this cause in this court.

Said appeal bond is in words and figures following, to wit:

117 Know all men by these presents that we, D. M. Osborne & Co., a corporation, as principal, and P. R. Flitcraft, as surety, are held and firmly bound unto Missouri Pacific Railway Company in the full and just sum of five hundred dollars, to be paid to the said Missouri Pacific Railway Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the March term, A. D. 1889, of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, in a suit depending in said court between D. M. Osborne & Company, a corporation, plaintiff, and The Missouri Pacific Railway Company, a corporation, defendant, a decree was rendered against the said plaintiff, D. M. Osborne & Company, and the said plaintiff having obtained an appeal of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said D. M. Osborne & Company, a corporation, shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

D. M. OSBORNE & CO., [SEAL.]
By P. R. FLITCRAFT, *Att'y.* [SEAL.]
P. R. FLITCRAFT. [SEAL.]

Approved by—
AMOS M. THAYER,
Dist. Judge.

[Endorsed:] No. 2775. United States circuit court, eastern division of the eastern judicial district of Missouri. D. M. Osborne & Co. *vs.* Missouri Pacific Railway Co. Bond, $500. —— ——, principal; —— ——, sureties. Filed 15th day of June, 1889. A. P. Selby, clerk.

118 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

D. M. OSBORNE & Co.
vs.
MISSOURI PACIFIC RAILWAY CO. } In Equity. No. 2775.

Mills & Fliteraft, solicitors for complainant.
T. J. Portis and Bennett Pike, solicitors for defendant.

Opinion of the Court on Exceptions and Demurrer to Amended Answer, May 26th, 1888.

THAYER, *District Judge:*

For the purposes of this decision I shall assume (without examining the question fully) that the damages described in the bill of complaint are of the kind contemplated by that clause of the constitution of the State of Missouri which prohibits property from being taken or damaged for public use without just compensation first ascertain- and paid. Art. 2, sec. 21.

It may be further conceded as an elementary proposition that if defendant has damaged complainant's property in the sense of the constitution (art. 2, sec. 21, *supra*) it cannot justify its act, either at law or in equity, under a municipal ordinance or under an act of the legislature.

In Missouri, however, for many years railroad companies have been authorized by a general law to use the streets of cities or villages for the purpose of laying their tracks, provided they are granted such privilege by the municipality.

119 *Vide* section 765, Revised Statutes of Missouri, 1879.

That portion of the answer in this case that is demurred to alleges that the city of St. Louis had passed an ordinance permitting the defendant to lay a side track along Gratiot street for a certain distance, and, furthermore, that, acting under the ordinance in question, it had actually laid its track along the street in question before complainant filed its bill in this case to restrain it from so doing.

The question that arises on the demurrer, therefore, is whether a court of equity will entertain a bill at the suit of an abutting proprietor to enjoin a railroad company from operating its trains over a track laid in a public street under legislative authority, in a case where none of complainant's property has been taken and the complainant has taken no action to arrest the work, and, so far as appears, has given no notice that damages will be claimed until after the track is completed and the road is in operation or ready for operation.

As I had occasion to suggest when this case was formerly before me on a motion to strike out parts of the answer, other courts have decided this question in the negative under statutes substantially the same as that which is in force in Missouri, holding in effect

that in such cases the complainant's remedy is by an action at law to recover damages and not by a bill for injunction.

Stetson *vs.* Chicago & Evanston R. R., 74 Ills., referred to and explained in Rigney *vs.* Chicago, 102 Ills., 79.
Hutton *vs.* London & Southwestern R. R., 7 Hare, 259.
Lister *vs.* Lister, 7 Ad. & E., 124.

If there are any decisions to the contrary on this point complainant's counsel do not seem to have discovered them, as none are cited.

An attempt is made to draw a distinction between the
120 constitution of Missouri and Illinois and to found an argument thereon in that the constitution of Missouri expressly requires compensation to be paid in advance of the taking of private property, whereas the constitution of Illinois contains no such express provision.

The distinction, however, has no significance, as the courts of Illinois have held that the constitution of that State requires compensation to be made before any property is taken, so that the constitutions of the two States are essentially the same in that respect.

Phillips *vs.* Park Com., 119 Ills., 627.
Chicago & St. Louis R. R. *vs.* Gates, 120 Ills., 86.

The fact that the constitution of the State requires compensation to be made in advance of the actual taking of property does not appear to me to have much bearing on the point to be determined on this demurrer.

The question at issue is whether a complainant who claims damages resulting incidentally to his property from the laying of a railroad track in a public street under a legislative and municipal license can wait until the work is done and then enjoin its operation, although none of his property is actually taken, or whether he should in such case be left to his remedy at law for the damage inflicted. Unless the wrong-doer is insolvent or unless some other cause exists to render the legal remedy of no avail it appears to me that on general principles he should be left to his legal remedy, and it was so held in the cases first above cited.

The rule does not deprive the complainant of the protection intended to be afforded by the constitution nor does it work any hardship. It simply requires the complainant to be diligent in applying for such relief as equity may afford.

It must not be forgotten that the constitution does not pro-
121 hibit property from being taken or damaged for public use; it provided simply that compensation must be made for property so taken or damaged.

Complainant is not therefore in the attitude of one who has a right to say that in no event shall the street in front of his property be occupied by railroad tracks. If the State and municipality authorize such use (as they have done in this case) it must submit to the inconvenience.

It is entitled to insist on compensation for the damage done (which

is generally held to be the deterioration in the value of the property), but as those damages can be assessed by a jury and the remedy at law is adequate there seems to be no occasion to apply for injunctive relief, and no propriety in granting such relief after the work is done and the road is in operation or is ready for operation.

I shall overrule the demurrer and the exceptions, holding that the matters pleaded in the answer at least show that complainant is not entitled to equitable relief.

122 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

D. M. OSBORNE & Co.
vs.
MISSOURI PACIFIC R'Y Co. } No. 2775.

Mills & Fliteraft, solicitors for complainant.
Thomas J. Portis and Bennett Pike, solicitors for defendant.

Opinion of the Court, March 11th, 1889.

THAYER, *District Judge:*

The first question that presents itself in this case, now that the evidence has been heard, is whether the complainant is entitled to equitable relief, even conceding that the laying of the track in and along Gratiot street did, to some extent, damage complainant's property within the meaning of the constitution of the State, article 2, section 21.

It is most likely true, as claimed by complainant's counsel, that by virtue of section 4, article 12, of the constitution of Missouri, complainant is entitled to have its damages assessed by a jury and that the court cannot in this proceeding assess the damages sustained and enter a decree therefor or make the right of the defendant to further use said track dependent upon its paying to complainant the sum so assessed.

At all events the court does not feel warranted in exercising powers of the doubtful nature last suggested; therefore if it grants any relief it must be an order of injunction restraining the defendant from using the Gratiot-street track until complainant's
123 damages are duly assessed by a jury in some form of proceeding and paid.

Should the court under the peculiar circumstances of this case grant such relief?

The testimony no doubt tends to show that the existence of a railroad track in Gratiot street lessens the value of complainant's property to some extent. Such depreciation in the value of the property seems to be largely due to the fact that the track is not laid for the full distance in the centre of the street, but inclines to the north and cuts the curb line at the west boundary of complainant's premises. That fact may lessen the value of the unimproved portion of complainant's lot and render it less marketable than it would otherwise be.

It may also be that the track along Gratiot street slightly interferes with the convenient receipt and delivery of goods at the south entrance of complainant's building on said street.

There is some testimony before the court to that effect; but the inconvenience resulting from such interference is evidently very slight. I will also add that it is by no means certain that the value of complainant's property is impaired in the manner above stated. Opinions *pro* and *con.* were expressed on that point by the various witnesses. A jury called to try the issue and assess the damages might reasonably find that no damage had been sustainsd in consequence of the laying of the track, or that the damages were inconsiderable. The court is of the opinion that the use of the track has not seriously obstructed and will not in future seriously obstruct access to complainant's premises, and that the damage done to its property in the way of lessening its market or rental value is in any event small.

The bill in the present case was filed February 16th, 1887, two days before the approval by the mayor of the city of St. Louis of the ordinance granting the defendant leave to lay the track
124 in question. The track was not laid, as the evidence shows, until March 20th, 1887. When work was begun by the defendant on the track no application was made for an injunction to stay operations for the time being. The case was not brought to a final hearing until nearly two years had elapsed, to wit, Jan'y 31st, 1889. Since the 20th of March, 1887, the track has been used daily, and in the meantime complainant has made no application for a temporary restraining order. If the court should at this late day enter a decree enjoining the use of the track if would probably put third parties to great inconvenience who are in a measure dependent upon it either for shipments or for supplies.

As the case stands, I know of no proceeding which the defendant can take to obtain an assessment of the damages, if any, that complainant has or will sustain by the location and operation of the track in Gratiot street. Complainant, on the other hand, has an adequate and simple remedy by an action at law to recover such damages.

As I remarked when this case was before me on demurrer to the answer (35 Fed. Rep., 84), the track was laid in pursuance of legislative and municipal authority, and is is no sense a public nuisance. Defendant has a right to use it on condition, of course, of paying such damages as abutting proprietors may have sustained.

Under the circumstances, the court is of the opinion that an injunction ought to be denied and the complainant remitted to his legal remedy. If it had made a seasonable application for a temporary injunction when the bill was filed, or when defendant began to construct the track, the court would undoubtedly have been authorized, on the averments of the bill and the showing now made, to grant such an order, but it does not follow that it ought, for that reason, to grant an injunction now. Injunctive re-
125 lief should be applied for seasonably. Even when there are

some grounds for such relief, it is in a measure discretionary with the court to grant or withhold it.

Bassett *vs.* Company, 47 N. H., 436.
Midland Railway *vs.* Smith, 15 N. E. Rep., 256.
2nd Wood Railway Law, page 794.
1st High on Injunctions, page 7, sec. 7.

For the reasons thus indicated I shall enter an order directing the dismissal of the bill, without prejudice to complainant's right to sue at law for the damages which it claims to have suffered.

(Here follow maps marked pp. 126 & 127.)

City surveyor's office, 615 Chestnut street.

ST. LOUIS, *9th January*, 1889.

This is to certify that on the 7th day of January, 1889, by order of D. M. Osborne & Co., I have made a topographical survey of the lot belonging to said company, situated at the northwest corner of 22d and Gratiot streets, in city block 2272, and have located the position of all the improvements erected upon said lot and upon land adjacent thereto. I have also shown the location of the railroad tracks and switches with reference to said buildings upon Gratiot street and between Gratiot and Atlantic streets and 22d and 23d streets, and that the result of said survey is correctly represented on the above plat.

In witness whereof I have hereunto set my hand and attached my official seal this the day and year first above written.

[SEAL.] JULIUS PITZMAN,
Surveyor of the City of St. Louis.

Survey executed by Otto Schmitz, deputy.

128 PLAINTIFF'S EXHIBIT "A."

UNITED STATES OF AMERICA, }
State of New York. }

By Frederick Cook, secretary of state and custodian of the great seal thereof.

It is hereby certified that Diedrich Willers was on the day of the date of the annexed certificate deputy secretary of state of the State of New York and duly authorized to grant the same—that is, same is in due form and executed by the proper officer; that the seal affixed to said certificate is the seal of the secretary of state of the State of New York; that the signature thereto of the said Diedrich Willers, deputy secretary of state, is in his own proper handwriting and is genuine, and that full faith and credit may and ought to be given to his official acts.

In testimony whereof the great seal of the State is
[SEAL.] hereunto affixed.

Witness my hand, at the city of Albany, the 11th day

of January, in the year of our Lord one thousand eight hundred and eighty-six.

FRED'K COOK,
Secretary of State.

Certificate of Incorporation.

We, the undersigned, do hereby certify that we associate
129 ourselves and form a company pursuant to an act of the legislature of the State of New York entitled "An act to authorize the formation of corporations for manufacturing, mining, and mechanical or chemical purposes," passed February 17, 1848, and the acts amending the same.

That the corporate name of said company is D. M. Osborne & Company. The object for which said company is formed is the manufacturing of reapers and mowers and other agricultural implements.

The amount of the capital stock of said company is three hundred thousand dollars, which shall be divided into and consist of three thousand shares of one hundred dollars each. The term of the existence of said company shall be fifty years from the date of this certificate.

The stock, property, and concerns of said company shall be managed by seven trustees. David M. Osborne, John H. Osborne, Alonzo G. Beardsley, Cyrenus Wheeler, Jr., William A. Kirby, Henry Morgan, and Orrin H. Burdick shall be the first trustees, and shall manage the concerns of the company for the first year. The operations of the company are to be carried on in the city of Auburn, in the county of Cayuga and State of New York.

In witness whereof we have hereunto set our hands the twenty-eighth day of April, one thousand eight hundred and seventy-five.

D. M. OSBORNE.
A. G. BEARDSLEY.
C. WHEELER, JR.
WM. A. KIRBY.
HENRY MORGAN.
A. H. BURDICK.

STATE OF NEW YORK, } ss:
City of Auburn, }

On this twenty-eighth day of April, 1875, before me came
130 David M. Osborne, Alonzo G. Beardsley, Cyrenus Wheeler, Jr., William A. Kirby, Henry Morgan, & Orrin H. Burdick, to me known to be the same persons described in and who executed the foregoing certificate of incorporation, and they severally acknowledged the execution of the same.

W. P. BEARDSLEY,
[L. S.] *Notary Public.*

(Endorsed:) Certificate of incorporation, D. M. Osborne & Company. Filed April 29, 1875. Diedrich Willers, Jr., secretary of state.

STATE OF NEW YORK, } ss:
Office of the Secretary of State, }

I have compared the preceding with the original certificate of incorporation of D. M. Osborne & Company, with acknowledgment thereto annexed, filed in this office on the twenty-ninth day of April, 1875, and do hereby certify the same to be a correct transcript therefrom and of the whole of the said original.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, this 11th day of January, one thousand eight hundred and seventy-*eighty*-six.

[SEAL.] DIEDRICH WILLERS,
Dep. Secretary of State.

131 DEFENDANT'S EXHIBIT No. 1.

13897.

An ordinance granting permission and authority to the Missouri Pacific Railway Company to lay a side track from its main tracks as now laid in Gratiot street, west of Twenty-third street, eastwardly over and along Gratiot street and over and across Twenty-third street, Twenty-second street and Twenty-first street, an alley in city block No. 2283, to the property of the St. Louis Wire Mill Company, situated in city block No. 2283.

Be it ordained by the municipal assembly of the city of St. Louis as follows:

SECTION 1. The Missouri Pacific Railway Company is hereby granted permission and authority to lay, maintain and operate a side track from its main tracks, as now laid across Gratiot street at a point west of Twenty-third street, eastwardly over and along Gratiot street, over and across Twenty-third street, Twenty-second street and Twenty-first street an alley in city block No. 2283, to the property of the St. Louis Wire Mill Company, situated on city block No. 2283, provided, that the Missouri Pacific Railway Company shall not use the track herein provided to be laid, maintained and operated for any other purpose than that of transporting cars to and from the St. Louis Wire Mill Company's property, and to and from the property of any other person or company owning property on said Gratiot street and desiring such connection, and first having obtained power and authority from the municipal assembly by ordi-ance, to lay, maintain and operate a spur track from the side track herein provided, to the property designated in the ordi-
132 nance to be passed, and, provided further that the Missouri Pacific Railway Company shall not at any time use the side track herein provided for, when the same is laid on said Gratiot street for the storage of loaded or empty cars.

SECTION 2. The said side track shall be laid under the supervision of the street commissioner; and the space between the rails and for two feet outside thereof, shall be kept in good repair by the said

Missouri Pacific Railway Company at its own cost and expense, with the same material as the adjoining street, and to the satisfaction of the street commissioner.

SECTION 3. The Missouri Pacific Railway Company before availing itself of the privileges granted by this ordinance, shall file its written acceptance of all the provisions of this ordinance with the city register, and shall at same time file its penal bond in the sum of five thousand dollars, to be approved by the mayor and city council, conditioned that the said company will save the city of St Louis harmless from any and all damages that may arise from the construction, maintenance and operation of said track, and that the said company will at all times observe and carry out the provisions of this ordinance in each and every respect. Said bond shall be renewed from time to time, as the mayor of St. Louis may direct, and any failure to make such renewal within a reasonable time when so ordered shall operate to forfeit all the rights and privileges granted by this ordinance.

SECTION 4. All other railroads shall have the right to connect their tracks with such switch, and use the same on reasonable terms and regulations, to be determined by the parties interested, and if they cannot agree upon the terms and the rules and regulations for that purpose, the same shall be determined by arbitrators, one to be appointed by each party, and if they cannot agree, the
133 difference shall be determined by a third party to act as umpire. If either party shall refuse after ten days' notice to appoint his arbitrator, or the arbitrator of either party refuses to act, the other party may appoint both arbitrators Provided, that any other railroad desiring connection for switch purposes to the said track, shall first obtain power and authority to do so from the municipal assembly by proper ordinance.

SECTION 5. The city of St. Louis reserves the right to repeal, alter or amend this ordinance at any time.

Approved Feb'y 18th, 1887.

I, Daniel O'C. Tracy, register of the city of Saint Louis, hereby certify the foregoing -- a correct, perfect, and true copy from the original roll, on file in this office, of an ordinance passed by the municipal assembly of the city of Saint Louis, entitled "An ordinance granting permission and authority to the Missouri Pacific Railway Company to lay a side track from its main tracks as now laid in Gratiot street west of 23rd street eastwardly," etc., and numbered 13897.

In testimony whereof I have hereunto set my hand and affixed the seal of the city of Saint Louis this nineteenth day of February, 1887.

[SEAL.] DANIEL O'C. TRACY, *Register*,
Per H. WOODS, *D'y*.

134 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record, pleadings, and proceedings in case No. 2775, of D. M. Osborne & Company, complainant, against Missouri Pacific Railway Company, defendant, as fully as the same remain on file and of record in said case in my office.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this fifteenth day of June, in the year of our Lord eighteen hundred and eighty-nine.

A. P. SELBY,
Clerk of said Court.

Endorsed on cover: Case No. 13,646. E. Missouri C. C. U. S. No. 424. D. M. Osborne & Company, appellant, *vs.* The Missouri Pacific Railway Company. Filed September 23, 1889.

147245248

Office Supreme Court U. S.
FILED.
OCT 20 1892
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

D. M. OSBORNE & COMPANY, A CORPORATION, *Appellant*,
v.
MISSOURI PACIFIC RAILWAY COMPANY, A CORPORATION, *Defendant*.
In Equity. No. 95.

STATEMENT AND BRIEF ON BEHALF OF APPELLANT.

J. E. McKEIGHAN,
H. E. MILLS,
P. R. FLITCRAFT,
Counsel for Appellant.

A. R. FLEMING & CO., PRINTERS, 522 N. Third Street, ST. LOUIS, MO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

D. M. OSBORNE & COMPANY, A CORPORATION, *Appellant*,
v.
MISSOURI PACIFIC RAILWAY COMPANY, A CORPORATION, *Defendant.*
In Equity. No. 95.

STATEMENT AND BRIEF ON BEHALF OF APPELLANT.

STATEMENT.

The bill prays for an injunction against defendant, restraining it from laying a track on Gratiot street, in the city of St. Louis, from its main line to the premises of the St. Louis Wire Mill Company, a private corporation. (For full text of bill, see pages 1, 2, 3, 4, 5 and 6, of Record.) The track is alleged to be for the sole benefit of the St. Louis Wire Mill Company. Gratiot street is a narrow street, extending east

and west, and is but twenty-four feet from curb to curb, and the premises of complainant are on the north side of Gratiot street, between Twenty-second and Twenty-third streets. Complainant is a large manufacturer of and dealer in farm machinery and appliances, with its factory outside of the State of Missouri; having a large warehouse, receiving and distributing office, in the city of St. Louis. Complainant's establishment, a large four-story structure with basement, fronts on Gratiot street, for the space of eighty-five feet, six inches, and the adjoining eighty feet on the west, extending up to property owned by the defendant, was bought for the purpose of improvement by buildings to be used in connection with the building already erected, which was built especially for, and adapted to, the purpose of receiving and distributing agricultural machinery, both in car lots and wagon lots.

It was admitted at the trial of the cause that the bill was filed, and process served on the defendant, February 16th, 1887, and that the track on Gratiot street was laid March 20th, 1887. (See Record, page 17.)

Prior to the filing of this bill, the defendant maintained nine railroad tracks in the rear of complainant's premises, and at the time of filing this bill, was proposing to construct a track through and along Gratiot street, in front of the premises of complainant. The bill was filed, and process served on defendant, February 16th, 1887, and on the 20th day of March following, more than thirty days after the filing of the bill and service of process on the defendant, the defendant constructed

the track on the street (Gratiot street), in front of complainant's premises, occupying with its track and road-bed almost the entire surface of the street from curb to curb, the width of the street from curb to curb being only twenty-four feet. The track from the western line of complainant's building gradually curves to the north line of the street, until it cuts the line of the curb at the point where the western line of complainant's vacant lot strikes the curb when projected south.

The premises of complainant were purchased for the purpose of erecting buildings and improvements thereon, for the purpose of receiving, handling, storing, shipping and distributing its farm implements and machinery, and, prior to the time said track was laid, had erected a large and commodious brick building, covering the eastern eighty-five feet and six inches of said premises, and so constructed it that a similar building could be erected on the western eighty feet. Said entire premises being bounded on the east by Twenty-second street, on the south by Gratiot street, on the west by property owned by the railroad, and on the north by railroad property; the defendant having, owning and operating nine railroad tracks immediately north and adjoining complainant's premises, extending along the entire northern line. The complainant owns and controls its own private switch along the northern line of its premises, between said premises and the nine tracks of the defendant.

By the construction of said track on Gratiot street, and by its intersection with the north curb of the street at about

the middle of complainant's unimproved property, that portion of complainant's property which is unimproved has no unobstructed means of ingress or egress, and is greatly damaged, not only for the purposes for which it was acquired, but for any other purpose.

Complainant annually receives, on its said premises, large and valuable consignments of agricultural machinery, about three-fourths of which are distributed by means of wagons, drawn by horses, and, in the construction of its said building, so constructed it that it could thus receive and discharge such implements as were received and discharged by wagon from the Gratiot street front, where they would be unobstructed by steam cars.

The construction of the railroad on Gratiot street has so damaged the premises that complainant cannot longer, with safety to itself, its customers, or employés, receive or discharge its merchandise and material from the Gratiot street front, and has rendered it difficult and hazardous to do so from the Twenty-second street side, for the reason that horses being driven in on the Twenty-second street side are hemmed in between the track on Gratiot street and the net-work of tracks on the north. In the construction of said building, complainant placed its offices on the corner of Twenty-second and Gratiot streets, fronting on Gratiot, to be thereby as far removed as possible from the noise, dust, smoke, and confusion of the railroad and its engines and cars in the rear.

The construction and operation of the Gratiot street track has greatly damaged said premises, and

the improvements thereon, rendering the same less valuable not only for the purpose intended, but for other purposes, by reason of the greatly increased danger accompanying ingress and egress, and by the noise, smoke, and confusion caused by engines and cars, and trains of cars, passing in front of the same, and in preventing complainant from using said premises as originally designed and intended. Said premises have been so damaged by the defendant, without first ascertaining the extent to which complainant was damaged or would be damaged, and before any such damages were paid to complainant, and the defendant has never paid or ascertained such damages.

Section 21, Article II, of the Constitution of Missouri, provides:

"That private property shall not be taken or dam-"aged for public use without just compensation. Such "compensation shall be ascertained by a jury or board "of commissioners of not less than three freeholders, "in such manner as may be prescribed by law, and "until the same shall be paid to the owner, the prop-"erty shall not be disturbed or the proprietary rights of "the owner therein divested."

The prayer of the bill asks: "That the defendant "be restrained and enjoined from commencing or car-"rying out the proposed construction of any railroad "track or switch, or from taking possession of said "Gratiot street for said purpose, or from using said "Gratiot street to the exclusion of complainant and the "public, and for all such other and further relief as "may be necessary and proper."

The answer of defendant sets up as a special defense the authority of an ordinance of the city of St. Louis, permitting the laying of a track on Gratiot street to the property of the St. Louis Wire Mill.

The cause was tried by the court, and evidence heard and received by the court to ascertain if complainant's property had been damaged by the laying and operation of the track on Gratiot street, but without receiving any evidence showing the extent of the damage, the court expressly stating that no evidence would be received looking to the extent of the damage.

After hearing all of the evidence, the court found that complainant's property was damaged by the existence of the railroad track on Gratiot street, but, nevertheless, dismissed complainant's bill, for the reason stated in a written opinion, and for the only reason that complainant had not made application for a temporary injunction before the laying of the track, and for that reason the court would not grant a permanent injunction, as prayed for in the bill, which had been filed and process served on the defendant on the 16th day of February, 1887, more than 30 days before the track was laid. (See opinion of court, pages 122 to 125 inclusive, of Record.) Whereupon complainant brings this cause to this court by appeal.

(Complainant has attached to and made a part of the record a map or drawing of complainant's premises, defendant's tracks, and adjoining streets and property, which map is marked Exhibit B, page 126, of Record.)

Assignment of Errors.

First.—The court erred in finding that the damage done to complainant's property in the way of lessening its market value is small, or in finding as to the amount of damages at all, because the amount of the damage was not presented in evidence, and from the ruling of the court could not have been presented. (See bottom of Record page 18, where the court says: "I am not going to hear evidence as to what those damages were, etc.")

Second.—The court erred in declaring that complainant's right to equitable relief, which by the opinion of the court did exist at the time of filing the bill, had become extinguished at the time of the hearing of the cause.

Third.—The court erred in declaring the law to be that equitable relief can only be granted to those who give bond at a preliminary hearing, and must be denied to those who submit their causes on final hearing.

Fourth.—The court erred in holding that injunctive relief was not asked for seasonably in this case, when such relief was asked for in the present bill, filed February 16th, 1887, and before the acts complained of were committed.

Fifth.—The court erred in holding that the right of complainant to sue for damages at law excused the occupation of the street by defendant's track, and that the defendant may be permitted to occupy said street to the damage of complainant, because the defendant

cannot have a convenient proceeding on its part to obtain an assessment of the damages, when the provisions of the constitution of the State of Missouri forbid all occupation and disturbance of the proprietary rights of abutting owners until the damages are assessed and paid. (See Sec. 21, Art. 2, of the Constitution of Missouri.)

Sixth.—The court erred in holding that third parties can obtain any vested rights in trespasses committed by defendant, or that the inconvenience to such third parties should have any weight in determining the rights of the parties hereto.

Seventh.—The court erred in holding that the granting of an injunctive order in this case was discretionary with the court.

Eighth.—The court erred in denying injunctive relief and dismissing complainant's bill, for the reason that such action of the court was against the law, and against the evidence, and against equity and good conscience.

The errors above assigned and set forth appear in the opinion of the court rendered upon the final hearing of the cause, and the declarations and holdings of the court can be best set forth by quoting the opinion in full. It is as follows:

OPINION OF THE COURT, MARCH 11TH, 1889.

Thayer, District Judge:

"The first question that presents itself in this case, now that the evidence has been heard, is whether the complainant is entitled to equitable relief, even conceding that the laying of the track in and along Gratiot

street did, to some extent, damage complainant's property, within the meaning of the Constitution of the State, article 2, section 21.

"It is most likely true, as claimed by complainant's counsel, that by virtue of section 4, article 12, of the Constitution of Missouri, complainant is entitled to have its damages assessed by a jury, and that the court cannot in this proceeding assess the damages sustained and enter a decree therefor, or make the right of the defendant to further use said track dependent upon its paying to complainant the sum so assessed.

"At all events, the court does not feel warranted in exercising powers of the doubtful nature last suggested; therefore, if it grants any relief, it must be an order of injunction restraining the defendant from using the Gratiot street track, until complainant's damages are duly assessed by a jury in some form of proceeding, and paid.

"Should the court, under the peculiar circumstances of this case, grant such relief?

"The testimony no doubt tends to show that the existence of a railroad track in Gratiot street lessens the value of complainant's property to some extent. Such depreciation in the value of the property seems to be largely due to the fact that the track is not laid for the full distance in the centre of the street, but inclines to the north, and cuts the curb line at the west boundary of complainant's premises. That fact may lessen the value of the unimproved portion of complainant's lot, and render it less marketable than it would otherwise be.

"It may also be that the track along Gratiot street slightly interferes with the convenient receipt and delivery of goods at the south entrance of complainant's building on said street.

"There is some testimony before the court to that effect; but the inconvenience resulting from such interference is evidently very slight. I will also add that it is by no means certain that the value of complainant's property is impaired in the manner above stated. Opinions *pro* and *con* were expressed on that point by the various witnessess. A jury called to try the issue and assess the damages might reasonably find that no damage had been sustained in consequence of the laying of the track, or that the damages were inconsiderable. The court is of the opinion that the use of the track has not seriously obstructed, and will not in future seriously obstruct, access to complainant's premises, and that the damage done to its property in the way of lessening its market or rental value is, in any event, small.

"The bill in the present case was filed February 16th, 1887, two days before the approval by the mayor of the city of St. Louis of the ordinance granting the defendant leave to lay the track in question. The track was not laid, as the evidence shows, until March 20th, 1887. When work was begun by the defendant on the track, no application was made for an injunction to stay operations for the time being. The case was not brought to a final hearing until nearly two years had elapsed, to-wit: January 31st, 1889. Since the 20th of March, 1887, the track has been used daily,

and in the meantime complainant has made no application for a temporary restraining order. If the court should at this late day enter a decree enjoining the use of the track, it would probably put third parties to a great inconvenience, who are in a measure dependent upon it either for shipments or for supplies.

"As the case stands, I know of no proceeding which the defendant can take to obtain an assessment of the damages, if any, that complainant has or will sustain by the location and operation of the track in Gratiot street. Complainant, on the other hand, has an adequate and simple remedy by an action at law to recover such damages.

"As I remarked when this case was before me on demurrer to the answer (35 Fed. Rep. 84), the track was laid in pursuance of legislative and municipal authority, and is in no sense a public nuisance. Defendant has a right to use it on condition, of course, of paying such damages as abutting proprietors may have sustained.

"Under the circumstances, the court is of the opinion that an injunction ought to be denied, and the complainant remitted to his legal remedy. If it had made a seasonable application for a temporary injunction when the bill was filed, or when defendant began to construct the track, the court would undoubtedly have been authorized, on the averments of the bill and the showing now made, to grant such an order, but it does not follow that it ought, for that reason, to grant an injunction now. Injunctive relief should be applied for seasonably. Even when there are some grounds

for such relief, it is in a measure discretionary with the court to grant or withhold it.

"For the reasons thus indicated, I shall enter an order directing the dismissal of the bill, without prejudice to complainant's right to sue at law for the damages which it claims to have suffered. (See Record, pages 122 to 125, inclusive.)

EVIDENCE.

At the hearing of this cause it was admitted and stipulated that the track in question was laid on the 20th day of March, 1887, and that the bill was filed and served on the 16th day of February, 1887. (See Record, pages 17 and 18.)

No testimony showing the extent to which the property was damaged was admitted. The court stating at the beginning of the hearing: "I am not going to "hear evidence as to what those damages were." (See bottom of Record page 18.)

Again the court says, addressing the counsel who was examining witness: "Now, Mr. Mills, as I am taking "this testimony as a commissioner really, you having "some experts present, I will allow you to show by "your experts the general fact whether the laying of "this track in Gratiot street enhances or depreciates the "market value of the property; *without going into the* "*question of amount*, and reserving the question for "future discussion, if it does depreciate it, whether that makes such damage as is recoverable." (See Record, page 40.)

F. W. Terpening, the general agent of complainant, testified substantially as follows: I represent D. M. Osborne & Co., of New York, in the sale of agricultural implements; have been representing them in St. Louis about eighteen months. Their place is at northwest corner of Twenty-second and Gratiot streets. The map (attached to Printed Record, and marked Exhibit B), correctly sets forth the situation of the property. The property fronts south on Gratiot street. The east eighty-five feet and six inches is covered by four-story and basement brick and stone building, which was erected by D. M. Osborne & Co. in 1884, for the purpose of using it for the storage and sale of agricultural implements. D. M. Osborne & Co. manufacture mowers, self-binders, and reapers. The property of complainant west of said improvements, except some old tenement houses, and a wagon shed, was purchased with the intention of putting up a building similar to the one on the property adjoining on the east. The one-story frame shanty, in the rear of the vacant property, is simply for unloading purposes in connection with the warehouse; it is simply a platform with a roof over it. My recollection is that Gratiot street, from curb to curb, is about twenty-five feet wide. (The plats, Complainant's Exhibit B and Defendant's Exhibit No. 2, both show the distance to be twenty-four feet from curb to curb, and Complainant's Exhibit B also shows that the vacant property of complainant fronts from eighty to eighty-one feet on Gratiot street.) The track is laid in the centre of Gratiot street, and Gratiot street is south of the Missouri Pa-

cific Railroad track. In the rear of the complainant's property are the tracks of defendant. The track in Gratiot street is of the standard gauge, four feet eight and one-half inches. It is the main track of the defendant which is north of our property, and the track in question is the one on Gratiot street, on the south of of our property. The track on Gratiot street extends west on Gratiot street until it strikes the main tracks of the Missouri Pacific near, I think, Twenty-third street. The track does not run along the centre of Gratiot street all of the distance between Twenty-second and Twenty-third streets; it diverges to the north, and is nearer the curb on the west corner of our unimproved property than it is at the corner of Twenty-second and Gratiot streets. Our four-story brick building on the corner of Twenty-second and Gratiot streets is adapted for the purpose of receiving and shipping freight, and we receive and ship freight both in car and wagon load lots, and in shipping lots less than car load lots we dray them to the various railroad stations. We also have a traffic with farmers and implement dealers (the majority being farmers), who come with their wagons to take their stock out, and there is not room between the curb and the track, on Gratiot street, for a farmer's wagon to back up and receive goods, and farmers have come to receive goods who would not receive their goods on account of the track being in front of the building. They would not drive their teams there, and we have been compelled to abandon loading there, for the reason that there is not sufficient room for a team to back up to receive or unload goods. To load

a wagon conveniently, the end must be towards the building, and in thus loading the team and wagon would project over the street and on the track. There is no regular schedule time for the running of trains on their track. They come and go as they please. They average about three trips each day, making six trains. Sometimes they run oftener, and when a train runs into the wire mill, it may be gone five, ten, or fifteen minutes; you can never tell. We are also subject to inconvenience on account of the passing of the locomotive, and the dust and smoke from the engine on the Gratiot track. Our building is on the corner of Gratiot and Twenty-second streets, with the office fronting on, and with its only entrance from Gratiot street. We also have a large entrance on Gratiot street for receiving and unloading freight. We are more inconvenienced by the smoke and dust in the summer than in the winter, for the reason that the windows are then all open. There is also considerable jarring to the building when the trains pass on Gratiot street. We deliver goods from the rear of our building immediately into the cars of the Missouri Pacific Railroad only in car load lots. Our property on the north abuts up againts the right-of-way of the Missouri Pacific Railroad, but our track is on our own property. Our switch on which we have those cars is our own property, and is our switch. All lots of goods in less than car load lots, which we wish to ship over any railroad, we cannot ship from the rear in the cars, but must deliver them by truck.

The condition of our vacant property has been changed by the construction of this track on Gratiot street in front of it. Should we construct a building on this vacant property, the southwest corner of it would only be the distance from the building to the curb, as the railroad track cuts the curb at that point, and no wagon could be placed in front of the building. Our vacant property is bounded on the north by the Missouri Pacific tracks, on the west by Missouri Pacific offices. The two-story brick building, marked on Exhibit B, is on the Missouri Pacific property. Our vacant property is bounded on the south by Gratiot street.

Gratiot street is an improved street, with sidewalks and curbing. It was, prior to the construction of the track, used for general travel, but now is only used by those who are *compelled* to travel over it. The switch and track on Gratiot street leads to the "St. Louis Wire Mill" factory, on the corner of Twenty-first and Gratiot streets, and is owned by the St. Louis Wire Mill Co. Engines often go up there with empty cars and leave them in the mill, and come back with the engine alone. The wire mill has a frontage of about seventy-five feet on Gratiot street, and is also on Twenty-first street.

Our building, on the corner of Gratiot and Twenty-second streets, extends back about 122 feet on Twenty-second street to the north; we have a door on Twenty-second street, from which we have been forced to receive and discharge freight, but farmers do not like to drive in there, because they are hemmed in between two tracks—the Gratiot street track on the

south of our building, and the railroad tracks north of our building.

We have had farmers refuse to drive in on Twenty-second street to receive goods, because they would not drive their teams between the tracks—fearing the passing of trains. From the corner of Twenty-second and Gratiot streets, to the rear of our property on Twenty-second street, there is a fall of about three feet, and the doors on the Twenty-second street side are not as well adapted for receiving and shipping freight as the Gratiot street front entrance; they are constructed with the bottom of the doors about three feet above the pavement, which is caused by the decline of the ground to the north, as all of the entrances in the building are on a level with the floor.

(For full report of testimony of F.W.Terpening, see pages 20 to 40, inclusive, of Record.)

F. W. Drury testified, that he was employed in the harvesting machine business, similar to complainant, and that the construction of the track on Gratiot street had the effect of depreciating the value of complainant's property.

Complainant's vacant property is well adapted for a warehouse similar to the one used by complainant, but it is not as desirable with the track on Gratiot street as with it away.

(For full statement of testimony of F. W. Drury, see pages 40 to 49, inclusive, of Record.)

(As appears on page 44, of Record, the court was asked if he considered at that time experts should be

asked as to difference in value; the answer of the court was: "Nothing about the amount, the only question "is to the effect whether it has depreciated it, or "enhanced it.")

Otto Schmitz testified, that he was a civil engineer, and made the survey from which map, Exhibit B, was made, and that the measurements and distances stated on the map, were correct. The track on Gratiot street, at the southwest corner of the Osborne property, is about eight feet from the property; it is at the curb. The curb is eight feet from the building line. The north line of defendant's track cuts the curb line where the western line of Osborne's property would touch the curve, if projected south.

The track begins to curve at about the west line of the present Osborne building, to curve north.

There is not room in the rear of the building between the building and switch for a driveway; besides, the switch is lower than Twenty-second street, but even if it was filled up it could not be used as a driveway.

All of the measurements on our map (from which Exhibit B. was made) are correct.

(For testimony in full of Otto Schmitz, see pages 49 to 52, inclusive, of Record.)

S. J. Fisher, Esq., real estate dealer, testified that he was familiar with the Osborne property. That the construction of the switch on Gratiot street tended to damage the property or to detract from its value, to the extent that it renders traffic by vehicles or drays

to any extent dangerous either in hauling to or hauling from. The track also tends to depreciate the vacant property just as it would improved property.

(For testimony in full of S. J. Fisher, see pages 52 to 56, inclusive, of Record.)

Testimony of the same import and effect, showing depreciations in the value of and damages to said property, by reason of the construction of the Gratiot street track, was give by Charles F. Vogel, real estate dealer, whose testimony appears on pages 56, 57 and 58, of Record; by David F. Kaime, real estate dealer, whose testimony appears on pages 58, 59, 60, 61 and 62, of Record; and by Oscar D. Carpenter, whose testimony appears on pages 62,63 and 64, of Record.

Diederich Norden, who lives at and occupies the northeast corner of Gratiot and Twenty-second streets, testified that he was carrying on a grocery store at corner of Twenty-second and Gratiot streets, and that he had been living on one or the other sides of Gratiot street for fourteen years, and that before the track was laid on Gratiot street, Gratiot street was a public highway, which was used and driven on the same as any other street in the city, but the construction of the track stopped all of that, and people now only drive there who are compelled to; and the laying of the track has depreciated the value of complainant's property, and it is now worth less than it was before.

(For testimony in full of Diederich Norden, see pages 64, 65, 66 and 67, of Record.)

Julius Pitzman testified, that he was city surveyor of St. Louis, and has been in such employment in St. Louis since 1855, excepting during the time he was in the army; that he was familiar with values of property in St. Louis; that he had had experience, and had acted as commissioner for purpose of assessing values and damages and benefits, by appointment of the Circuit Court of the City of St. Louis, in both partition and street opening cases, and in condemnation proceedings.

The survey (Exhibit B) was made under my supervision, and I have since examined the property to verify it. From my acquaintance and experience in property in the city of St. Louis, I think the property of complainant is injured by the construction of the railroad track on Gratiot street. I think the whole value of the building, as well as the fee simple, of the vacant property, is injured by the construction of that switch, because the property has all switch facilities it needs, having switches on the north side and tracks; it gives them all the railroad facilities they want, and they want the use of the other (Gratiot) street, uninterrupted, for filling their warehouse or discharging freight received by the railroad; I can imagine a condition of things by which the track will injure more materially that property, the track being up to the curbstone. Gratiot street is an open, improved highway, curbed, guttered, macadamized, and with pavements. There is no possible access to this property from the north, except by rail.

(For testimony in full of Julius Pitzman, see pages 67, 68, 69, 70 and 71, of Record.)

J. W. Higbee, for plaintiff, testified that he had been with complainant in St. Louis about four years; that he was assistant manager, and as such was kept largely in and about the office and premises; that by means of the laying of the track they suffered great inconvenience in the loading and transportation of goods by wagons in general; that three quarters of all goods go out of the building by wagons, and about one-tenth come in by wagons; that before the track was laid on Gratiot street, it was open to public travel; that since, the travel has been greatly deminished, and by reason of the track they have been unable to use the Gratiot street front of the building with any degree of success, as we have seldom been able to serve customers who come with their own vehicles on the Gratiot street front, the trains passing prevented teams from driving there and stopping to load or unload. The trains run irregularly from about 9 A. M. to 3 P. M., I think there are from three to five trains pass daily, making thus from six to ten trips. The annoyance also from the smoke and gas from the operation of the road is very great. The office being above grade, and on about a level with the top of the engine; the black smoke from the engine pours in and makes it very disagreeable, especially when the wind is from the south, which is generally the case in St. Louis. The noise is also very disagreeable, it is almost impossible to hear, unless close together.

(For the full testimony of J. W. Higbee, see pages 75 to 80, inclusive, of Record.)

R. W. Morrison testified, that he built the complainant's building, that he had been engaged as a builder in St. Louis for about 15 years, and owns real estate in St. Louis; that the construction of the track on Gratiot street depreciated the value of complainant's property; that it would affect the unimproved property more than the corner on which the building was situated. (For the full testimony of R. W. Morrison, see pages 71, 72, 73, 74 and 75, of Record.)

James W. Peters, for plaintiff, testified, that he was bill clerk for D. M. Osborne & Co., and been so employed since 1886. The trains run irregularly on Gratiot street. I have seen four trains a day, and sometimes two and three. I mean trains down. Each train makes two trips from our warehouse. I reckon a train could be seen coming down about 125 feet, that is from the west side. I do not think we would know they were coming, until within about 100 feet of our building. About three-fourths of our goods go out by wagons. (For the full testimony of James W. Peters, see Record, pages 81, 82, 83, 84 and 85.)

Concerning the testimony produced by defendant, we will state that its experts, with one exception, on cross-examination, admitted that under the facts in this case the Gratiot street track depreciated the value of complainant's property.

Defendant's witness, *J. M. Carpenter*, on cross-examination, when asked if the property had not been damaged by the construction of this switch in front of it said: "It certainly has not benefited this vacant lot "here (referring to complainant's vacant property).

"If I owned it, having this track here and this angle, I "would rather not have this track come right up to the "curb." (See Record, page 101.)

Again, *Marcus A. Wolff*, an expert witness for defendant, on cross-examination, said:

"Q. If you cut off communication by drayage it "would be a detriment. If you interfere, it would be "a detriment to the extent it was interfered with? A. "Yes, sir." (See Record, page 105.)

Again, on page 109 of Record, the same witness, on cross-examination, said: "Q. Suppose this track was "not made for the benefit of this particular adjoining "property, but for parties further on, and the track "was used, by shifting cars back and forth at uncertain "times during the day, would that enhance the value "of the property? A. I don't think it would."

That this track was purely for the benefit of a private corporation, The St. Louis Wire Mill Co., we have the testimony of one of defendant's own witnesses, *Mr. William F. Foley*, defendant's assistant yard-master, who, on direct examination by defendant's counsel, testified as follows:

"Q. Where do the cars go to, and where do they "come from (referring to the cars hauled over the "Gratiot street track)? A. The cars are delivered to "us by the Bridge & Tunnel Company. Q. To what "place do they go? A. To this wire mill (meaning "St. Louis Wire Mill Co.) inside of their building."

* * * * * * * * * *

"Q. Do you take in and out of them any other cars "except those that belong to the Wire Mill Company? "A. No, sir." (See Record, page 86.)

POINTS.

1. Art. 2, Sec. 21, of the Missouri Constitution of 1875, provides:

"That private property shall not be taken or dam-"aged for public use without just compensation. Such "compensation shall be ascertained by a jury or board "of commissioners of not less than three freeholders, "in such manner as may be prescribed by law; and until "the same shall be paid to the owner, or into court for "the owner, the property shall not be disturbed or the "proprietary rights of the owner therein divested."

This section of the Constitution requires compensation to be paid in advance to owners for such damages to property as were previously considered consequential, and included therein damages to property caused by construction of steam railroads in streets.

Rude v. St. Louis, 93 Mo. 416;
Chicago v. Taylor, 125 U. S. 161;
Chicago R. R. v. Ayres, 106 Ill. 518;
Dupuis v. Chicago R. R., 115 Ill. 97;
Chicago R. R. v. Loeb, 118 Ill. 208;
Chicago R. R. v. Bowman, 122 Ill. 595;
Calumet R. R. v. Moore, 124 Ill. 329;
Centralia R. R. v. Brake, 125 Ill. 393;
Atchison R. R. v. Schneider, 127 Ill. 124;
Lake Erie R. R. v. Scott, 132 Ill. 429;
Johnson v. Parkersburg, 16 W. Va. 402;
Hutchinson v. Parkersburg, 25 W. Va. 226;
Spence v. Pt. Pleasant R. R., 23 W. Va. 406;
Arbenz v. Wheeling R. R., 33 W. Va. 1;

Reading v. Althouse, 93 Pa. St. 400;
Pusey v. Alleghany, 98 Pa. St. 526;
Phila. R. R. v. Getts, 113 Pa. St. 214;
Pittsburg R. R. v. Vance, 115 Pa. St. 325;
Auman v. Phil. R. R., 133 Pa. St. 93;
Penn. R. R. v. Miller, 134 U. S. 75;
Hot Springs R. R. v. Williamson, 45 Ark. 429;
City Council v. Townsend, 80 Ala. 489;
Columbus Ry. v. Witherow, 82 Ala. 195;
Gottschalk v. C., B. & Q. R. R., 14 Neb. 550;
Republican R. R. v. Fellers, 16 Neb. 169;
Omaha R. R. v. Janecek, 30 Neb. 276;
Omaha H. Ry. v. Cable Tramway, 30 Fed. R. 332; 34 Fed. R. 733;
Blanchard v. City of Kansas, 16 Fed. R. 444;
McElroy v. Kansas City, 21 Fed. R. 257;
Werth v. Springfield, 78 Mo. 107;
Householder v. Kansas City, 83 Mo. 494;
Julia Building Co. v. Bell Tel. Co., 88 Mo. 256;
Sheehy v. K. C. Cable Ry., 94 Mo. 579;
K. C. R. R. v. St. Jo Terminal, 97 Mo. 457;
Gulf Ry. v. Eddins, 60 Tex. 663;
Story v. Elevated Ry., 90 N. Y. 122;
Lahr v. Metropolitan El. Ry., 104 N. Y. 268;
Abendroth v. El. R. R., 122 N. Y. 1;
Kane v. Met. El. R. R., 125 N. Y. 164;
Denver v. Bayer, 7 Col. 113;
Mollandin v. U. P. R. R., 14 Fed. R. 394;
Frankle v. Jackson, 30 Fed. R. 398;
Denver Circle R. R. v. Nestor, 15 Pac. R. 714;
Denver R. R. v. Bowne, 16 Pac. R. 839;

Gulf R. R. v. Fuller, 63 Tex. 467;
Ry. Co. v. Golding, 68 Tex. 688;
Gainesville R. R. v. Hall, 78 Tex. 169;
Atlanta v. Green, 67 Ga. 386;
Guess v. Stone Mount R. R., 72 Ga. 320;
Weyl v. Sonoma R. R., 69 Cal. 202;
Adams v. Chicago R. R. (Minn.), 39 N. W. Rep. 629.

2. The owner of an abutting lot has a special interest in the street, distinct in kind, and in addition to that enjoyed by the public in general. Interference with the right of ingress and egress, light, air, access by customers, by teams and vehicles, and the use of the enjoyment of the street, is a damage peculiar to the owner, and protected by the Constitution.

Rude v. St. Louis, 93 Mo. 414;
McQuaid v. Portland R. R. (Oreg.), 22 Pac. R. 899;
Pittsburgh R. R. v. Vance, 115 Pa. St. 325;
Dillon on Mun. Corps., §§730–734;
Lackland v. N. Mo. R. R., 31 Mo. 186; 34 Mo. 274.

3. Where buildings have been erected, adapted to a particular purpose, and a public improvement is made, which injuriously affects the property and reduces its market value, such a damage is for public use, and requires compensation to be made.

Chicago v. Taylor, 125 U. S. 161;
Calumet R. R. v. Moore, 124 Ill. 329;
Chicago R. R. v. Bowman, 122 Ill. 595;

Dupuis v. Chicago R. R., 115 Ill. 97;
Centralia R. R. v. Brake, 125 Ill. 393;
Atchison R. R. v. Schneider, 127 Ill. 144;
Philadelphia R. R. v. Getts, 113 Pa. St. 214;
Pittsburg R. R. v. Vance, 115 Pa. St. 325;
Laflin v. Chicago R. R., 33 Fed. R. 415; 34 Fed. R. 859.

4. Damage to property caused by dust, smoke, noise and vibration produced by steam railroads in streets, are elements of damage to be considered.

Adams v. Chicago R. R. (Minn.), 39 N. W. Rep. 629;
Gainesville R. R. v. Hall, 78 Tex. 169;
Chicago R. R. v. Loeb, 118 Ill. 208;
Lewis' Eminent Domain, §230;
Mills' Eminent Domain (2d Ed.), §193.

5. The proper remedy is an injunction, until the damage to plaintiff's proprietary rights is ascertained and paid.

Carpenter v. Grisham, 59 Mo. 247;
McPike v. West, 71 Mo. 199;
McElroy v. Kansas City, 21 Fed. Rep. 257;
Columbus R. R. v. Witherow, 82 Ala. 195;
Weyl v. Sonoma Val. R. R., 69 Cal. 202;
Macon v. Harris, 75 Ga. 761;
Georgia R. R. v. Ray, 11 S. E. R. 352; 84 Ga. 376;
Cox v. Louisville R. R., 48 Ind. 194;
Terre Haute R. R. v. Rodell, 89 Ind. 129;
Midland Ry. v. Smith, S. Ct. Ind., 15 N. E. Rep. 256;

Harrington v. St. Paul R. R., 17 Minn. 215;
Wagner v. Ry. Co., 38 O. St. 32;
Jardan v. Phil. R. R., 3 Whart. 502;
Borough of Verona, 108 Pa. St. 83;
Monmouth Co. v. Holmdel Tpk. Co., 18 N. J. Eq.——;
Mettler v. Gaston R. R., 25 N. J. Eq. 214;
Railroad v. Angel, 41 N. J. Eq. 316;
Forsyth v. Wheeling, 19 W. Va. 318;
Mason City Salt Co. v. Mason, 23 W. Va. 211;
Mills' Em. Dom., 2d Ed., §130;
Republican Val. R. R. v. Fink, 18 Neb. 87;
Hull v. C., B. & Q. R. R., 21 Neb. 371;
Kittell v. Missisquoi R. R., 56 Vt. 96;
Phillips v. S. Park Com'rs, 119 Ill. 627;
Chicago R. R. v. Gates, 120 Ill. 86.

6. It is the province of a jury to determine the extent of the damage.

Lackland v. N. Mo. R. R., 34 Mo. 276;
Mo. Const., Art. XII, §4.

BRIEF.

I.

The Missouri Constitution, 1875, Art. 2, Sec. 21, requires compensation to be paid in advance to owners for such damages to property as were previously considered consequential, and included therein damages to property caused by construction of steam railroads in streets.

The provision is "that private property shall not be taken or *damaged* for public use without just compensation." This court, in the case of Rude v. St. Louis, 93 Mo. 416, remark that this section is the same as that of the Constitution of Illinois of 1870. It is a fact that, beginning in 1870, several of the States commenced to make changes in their Constitutions, enlarging the scope of the inquiry for damages, so as to include damages to property injuriously affected by public improvements, and providing that damages previously considered consequential should thereafter be recoverable by the owner. The Supreme Court of the United States, in the case of Chicago v. Taylor, 125 U. S. 161, take occasion to construe the Constitution of Illinois, and comment on the change resulting from the introduction of the word "damaged," and say? "Such a change in the organic law was not meaningless, but it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property sought to be appropriated to public use than was guaranteed

by the former Constitution." The court approved the ruling of the Supreme Court of Illinois in the case of Chicago R. R. v. Ayres, 106 Ill. 518, which was a case of a railroad in a street, and say: "A recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character, that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad, or other improvement, is the cause of the damage, though consequential, the party may recover." As to the character of the damage, the Supreme Court of the United States approve this portion of the charge to the jury: "The real question is, has the value of this property, to sell or rent, been diminished by the construction of this viaduct? It may be that it can no longer be used for the purposes of a coal yard, or for any purpose for which it has been heretofore used, but that would not be material, if it can be rented or sold at as good a price for other purposes, except that if the proof satifies you that any of the permanent improvements put on the lots for the particular business which has been heretofore carried on there, and for which it was improved, have been impaired in value, or are not worth as much after this viaduct was built and the bridge was raised as before, and you can from the proof determine how much these improvements are damaged, the plaintiff would be entitled to recover for such damage to the improvments, that is to say, this lot being improved for a

specific purpose, if the proof satisfies you that it can no longer be rented or used for that purpose, and that thereby these improvements have been lost or impaired in value, then the impairment of value to these improvements is one of the elements of damages, which the plaintiff is entitled to have considered and passed upon and included in his damage."

The Illinois Supreme Court has followed the above doctrine in the following cases:

Dupuis v. Chicago R. R., 115 Ill. 97;
Chicago R. R. v. Loeb, 118 Ill. 208;
Chicago R. R. v. Bowman, 122 Ill. 595;
Calumet R. R. v. Moore, 124 Ill., 329;
Centralia R. R. v. Brake, 125 Ill. 393;
Atchison R. R. v. Schneider, 127 Ill. 124.

The latest case in Illinois is that of Lake Erie R. R. v. Scott, 132 Ill. 429. This case was one of construction of railroad on highway in front of plaintiff's farm, his residence, stable and other buildings fronting on highway, and the access thereto rendered dangerous by ordinary operation of road. The court, in opinion, use the following language:

"We are inclined to think that there is no good reason for distinguishing between an injury arising from an interference with appellee's right to the advantages the highway gave his farm, caused by the physical obstruction placed therein, and where the same kind of an injury is produced by the operation of trains beside it. In either case the advantages given to the farm by

the highway have to some extent been destroyed and the land lessened in value.

"If it be conceded that the result of operating the road has in fact injured appellee's farm in a way not common to the public, and thereby made it less valuable, it would seem to follow, as a necessary consequence, that it has been damaged for public use. Such operation being lawful, and confined to the right-of-way, does not release appellant from liability, for it would clearly be liable for damages caused by an unlawful act, and as we understand the constitutional provision that private property shall not be taken nor damaged for public use without just compensation, it means to cover cases where damages are caused by acts that are legal and entirely within the powers of the corporation performing them, but in the doing of which, for the use and benefit of the public, private property is damaged.

"It is the right which appellant has at its pleasure and for all future time to operate its trains that at once depreciates the value of the farm, and not the effect produced by the passing of particular trains, or any particular injury or accident that may occur to appellee's property therefrom; hence the damages arose at the time of the construction of the road, and were then capable of being determined once for all."

In 1872, the Constitution of West Virginia was changed by the introduction of the expression, "taken or damaged for public use." The Supreme Court declared that consequential damages, resulting from changes of grades in streets, required compensation

(Johnson v. Parkersburg, 16 W. Va. 402; Hutchinson v. Parkersburg, 25 W. Va. 226), and that the occupation of streets by railroads, although authorized by municipal ordinance, required compensation to the abutting owners. Spencer v. Pt. Pleasant R. R., 23 W. Va. 406. The measure of damages was considered to be the difference in the market value of the property affected to sell or rent. On the argument below the defendant relied on the case of Arbenz v. Wheeling R. R., 33 W. Va. 1, as being a departure from the doctrine, or at any rate an authority to the effect, that injunction was not the proper remedy. An examination of the provisions of Art. 9, Sec. 3, of the West Virginia Constitution, will show that compensation for property damaged is not required to be paid before the damage is done; while in cases of incorporations, for internal improvements, private property shall not be *taken* until compensation shall have been paid. Compensation for property not taken, but damaged, is to be recovered in an action at law, and compensation for damages to the property of abutting owners, caused by the construction of railroads in public streets, is recognized in the Arbenz case as being recoverable by virtue of the provision of the Constitution requiring compensation for property "damaged."

In 1873, the Constitution of Pennsylvania was changed by the introduction of the expression: "Compensation for property taken, injured or destroyed." The Supreme Court of Pennsylvania hold that the new clause has made a radical change in reference to consequential damages, and say: "The old cases, holding that con-

sequential damages cannot be sustained against a city, are of no value now," and that "The new Constitution covers damages necessarily consequential, as they arise from the disturbance or abridgment of an incorporeal right.

Reading v. Althouse, 93 Pa. St. 400;
Pusey v. Alleghany, 98 Pa. St. 526.

In this last case the court say: "Corporations, municipal as well as others, in whom are invested the right of eminent domain, are required to make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements." They are "liable for such damages as are ordinarily called consequential." There has been no hesitation in applying this doctrine to railroads in streets, and any reduction in the value of abutting owner is protected, whether this results from the construction of the railroad causing adjoining property to be unsuitable for the business for which it was constructed, as in Phila. R. R. v. Getts, 113 Pa. St. 214, or from rendering access to factory dangerous for teams, as in Pittsburg R. R. v. Vance, 115 Pa. St. 325; or from injuries anticipated from the operation of the railroad, as in Auman v. Phil. R. R., 133 Pa. St. 93, it being presumed that the railroad company will use the track to the fullest extent. This section of the Constitution has also been considered in the case of Penn. R. R. v. Miller, 134 U. S. 75.

In 1874, the Constitution of Arkansas was changed by the introduction of the expression: "Property shall

not be taken, appropriated or damaged for public use, without just compensation therefor." In the case of Hot Springs R. R. v. Williamson, 45 Ark. 429, it is held that an abutting owner, whether he has the fee in the street or not, can recover damages for injury to his property by laying of railroad tracks in the street, although no property is taken. The court examines the cases thoroughly, especially under the English Lands Clauses Act, which uses the expression: "injuriously affected," and concludes that damages to the access to the property and reduction of market value, resulting from occupation of a street by a railroad, are protected by the new expression in the Constitution of 1874.

In 1875, the Constitutions of three States were changed in this particular: Alabama provided compensation "for the property taken, injured or destroyed." Nebraska provided compensation for property "taken or damaged," and Missouri, that property shall not be "taken or damaged for public use, without just compensation."

The Supreme Court of Alabama, in the case of City Council v. Townsend, 80 Ala. 489, consider that the words "injured or destroyed" include damages heretofore considered consequential, and follow the Supreme Court of Pennsylvania, in Reading v. Althouse, 93 Pa. St. 400, on the ground that the new provision of the Constitution was taken from the Pennsylvania Constitution of 1873. In the later case of Columbus Ry. v. Witherow, 82 Ala. 195, this court had occasion to consider the damages to an adjoining owner

from the laying of the track of a railroad operated by steam in a street, under the authority of a municipal ordinance, and the court say that the new provision of the Constitution means to include the consequential damages from which municipal corporations and railroad corporations had been exempt prior to the change in the Constitution.

The Supreme Court of Nebraska places the same construction on the new clause in the Constitution of that State, and applies the same rule as to damages resulting from the occupation of a street by a railroad.

Gottschalk v. C., B. & Q. R. R., 14 Neb. 550;
Republican Val. R. R. v. Fellers, 16 Neb. 169;
Omaha R. R. v. Janecek, 30 Neb. 277.

In the case of Omaha Horse Ry. v. Cable Tramway, 30 Fed. Rep. 332, Judge Brewer had occasion to consider the protection to be awarded to a horse railway company, having an easement in the street, from damage resulting from the crossing of the tracks, and from interruption of access caused by a cable road, which, in some places, crossed the tracks of complainant, and in other places ran parrallel to them. The court says: "There are at least two matters which are clearly proper matters of consideration in estimating the plaintiff's damages: *First*, the inconvenience and annoyance which results from the crossing of plaintiff's tracks by the track of defendant; *Second*, the interruption of access to plaintiff's cars by the track and cars of defendant, between its track and the sidewalk." When this case was again heard, Judge Brewer, in his

opinion, in 34 Fed. R. 733, commented on the change in the Constitution, as follows: "Formerly all compensation was limited to cases in which property was taken. That was the scope of the constitutional provisions, but the often manifest injustice of such limitation has led to constitutional action in many States, extending compensation to cases in which property is damaged, although none is actually taken." * * "Interfering with freedom of access from the street would be declared a proper subject of compensation."

Before the Supreme Court of Missouri had occasion to pass upon this expression in the Missouri Constitution, Mr. Justice Miller, of the United States Supreme Court, in the case of Blanchard v. City of Kansas, 16 Fed. R. 444, commented on the material change made in the Constitution by the introduction of the word "damaged," and held distinctly that the new provision called for damages resulting from changes in grades of streets where no part of the land of the abutting owner was taken. This was a damage previously considered consequential. Judge Brewer, in the case of McElroy v. Kansas City, 21 Fed. R. 257, comes to the same conclusion. The damages resulting to an abutting owner by changes of grades, and by occupation of streets by railroads, were considered, prior to the change in the Constitution, as alike in kind, and were denominated consequential, and not the subject of recovery. The same argument was used in reference to both classes of damage. It was claimed that in the original condemnation of the street, the land was taken for all the purposes to which the street might be put, and that

the public authorities might change the grade, or authorize a railroad track to be laid on the street, because such uses were contemplated in the original condemnation, and having been once paid, could not again become the subject of a claim. There never was any argument or suggestion that the right of a railroad company to occupy a street, under a municipal ordinance, rested upon any different basis than that of the municipality to damage property by a change of grade.

Both uses were contemplated in the original condemnation, and damages for both prospective and possible uses of the street were paid originally once for all. When the Supreme Court of the State of Missouri came to consider the question of damages to abutting owners, arising from changes of grade made after the adoption of the new Constitution, there was no difficulty in arriving at the conclusion that such damages were within the protection of the new clause in the Constitution. In Werth v. City of Springfield, 78 Mo. 107, the Supreme Court uses this language: "When property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use, within the meaning of the Constitution." And this section of the Constitution is self-enforcing. Householder v. Kansas City, 83 Mo. 494. The next case is that of Julia Building Company v. Bell Telephone Company, 88 Mo. 256. This decision was by a divided court. The dissenting opinion is the better law, and in accord with the courts of all of the States that have adopted clauses including the

word "damaged." It is not a decision covering the question of the damage resulting from the laying of the railroad in a public street. It is true that the majority opinion cites certain cases decided under the old Constitution in reference to laying of tracks in the streets. In deciding the question of damages from changes of grade in the streets, the Supreme Court could have cited a great number of old cases under the old Constitution, declaring that no damages could be recovered for changes in grade, and have ignored the new clause in the Constitution. This allusion to railroads in the streets was an *obiter dictum*, and the question as to a recovery for such a peculiar damage, as has been proved to have been suffered by the complainant in this case, is still an open question in this State. In the case of Rude v. the City of St. Louis, 93 Mo. 414, the court approves the following quotation from Dillon on Municipal Corporations: "Although the distinction between the nature of the rights of the public in a street and the right of an individual proprietor to access to his premises from the street has been often overlooked, yet it is one which has been asserted by high authority. The right of an abutting owner to access to and from the street is a private right, in the sense that it is something different from the right which the members of the public have to use the street for public purposes. Conformable to this distinction, and in part based upon it, a person owning or in possession of premises abutting on the public highway or street, whose right of access to the same is unreasonably or unlawfully obstructed, may

recover from the person causing such obstruction damages for the private injury he sustains, where such damages are particular, direct and substantial." In the case of Sheehy v. Kansas City Cable Ry., 94 Mo. 579, the court recognizes the liability of the railroad company to pay damages resulting to an abutting owner from construction of a cable road in a street, although authorized by municipal ordinances, and that the damages considered as *damnum absque injuria* prior to the change in the Constitution are now protected and recoverable by the abutting owner. The court cites numerous cases, holding the doctrine that the owner of property abutting a street has such an easement therein as would support an action for damages peculiar to him. The case of Kansas City R. R. Co. v. St. Joe Terminal Company, 97 Mo. 457, throws no particular light on the question in controversy here, but the decision asserts the doctrine that private property cannot be damaged until the amount of compensation shall be ascertained and paid to the owner, or into court for the owner, and that a court of equity would enjoin one who proposes continuously to damage private property for a public use, without having first made compensation to the owner. In the Sheehy case the court cites with approval the case of Gulf Ry. v. Eddins, 60 Tex. 663, which is positive, to the effect that the construction of a railroad on the grade of a street is such a damage to adjoining property that compensation should be made in obedience to the clause in the Texas Constitution, corresponding to the clause in the Missouri Constitution

now under discussion. The court also cites approvingly the New York cases, known as the Elevated R. R. cases: Story v. Elevated Railway, 90 N. Y. 122; Lahr v. Metropolitan Elevated Railroad, 104 N. Y. 268; Abendroth v. Elevated Railroad, 122 N. Y. 1; Kane v. Metropolitan Road, 125 N. Y. 164. In the Sheehy case the court approved the instruction that the measure of damages was the difference in the market value of the property before and after the change. That is equivalent to saying, that since the change in the Constitution any construction of tracks or changes of grade, which reduce or affect the market value of the property of abutting owners, constitute a damage within the constitutional provision.

In 1876, the Constitution of the State of Colorado was changed by introduction of the words, "taken or damaged," and the Texas Constitution, by the introduction of the words, "taken, damaged or destroyed."

The Supreme Court of Colorado, in the case of Denver v. Bayer, 7 Col. 113, in a suit brought by an abutting owner for damages against the city of Denver, which had passed an ordinance allowing a railroad to lay a track in a street, said: "Whatever permanently prevents the adjacent owner's free use of the street for ingress or egress to or from his lot, and whatever interference with the street permanently diminishes the value of his premises, is as much a damage to his private property as though some direct physical injury were inflicted thereon." The depreciation in market value of the premises is made the test of the damage. The Federal Court in Colorado, in the case of Mollandin v.

U. P. R. R., 14 Fed. R. 394, had come to the same conclusion; and Judge Brewer, in the case of Frankle v. Jackson, 30 Fed. R. 398, approves the doctrine laid down in Denver v. Bayer, 7 Col. 113. In Denver Circle R. R. v. Nestor, 15 Pac. R. 714, the court holds that abutting owners are entitled to recover damages against the railroad company for laying tracks in the streets. The same court, in Denver R. R. v. Bowne, 16 Pac. R. 839, says: "When a depreciation in market value results from construction of a railroad in a street, the company is liable, notwithstanding an ordinance of the municipality in terms authorized such use of the streets." Witnesses were allowed to testify as to the diminution in rents collected, and the fact that there would have to be a change of business, and a reconstruction, to utilize the property.

In Texas, the provision in the new Constitution is held to protect the abutting owners from damage resulting in depreciation of market value, caused by construction of a railroad in a public street. Gulf R. R. v. Eddins, 60 Tex. 656; Gulf R. R. v. Fuller, 63 Tex. 467; Ry. Co. v. Golding, 68 Tex. 688; Gainsville R. R. v. Hall, 78 Tex. 169. In the latter case the railroad was constructed, not on Hall's lot, nor on the street adjoining the lot, but paralled to Hall's lot, and distant therefrom some 37 feet. Damages were allowed resulting from the vibration, noise, smoke, noxious vapors and cinders, incident to the running of trains on the road. It was true that the railroad company was authorized by the public authority to lay the track where they did, but this authorization must be subject

to the constitutional provision that if such lawful act, made lawful by the public authority, shall result in injury to the private property of any individual, that that injury must be paid. A railroad company would be liable for such injury in the same manner that a private individual would be liable for injury caused by a similar act.

In 1877, the Constitution of the State of Georgia was changed by the introduction of the words, "taken or damaged." The Supreme Court says, in the case of Atlanta v. Green, 67 Ga. 386: "We must presume that the Convention intended that any damage, whether direct or consequential, done to property for public use, must be compensated for," and hold that the depreciation in market value, caused by changes in the public streets, is protected by the Constitution. The same doctrine is declared in reference to railroads laying tracks in streets. Guess v. The Stone Mountain R. R., 72 Ga. 320.

In 1879, the Constitution of the State of California was changed by the introduction of the words, "taken or damaged." In the case of Weyl v. Sonoma R. R., 69 Cal. 202, the Supreme Court of that State say: "A steam railroad cannot run over a street without compensation to the abutting owner first being made."

We have thus far set forth the rulings of the courts in those States where changes in constitutional provisions have been made similar in effect to the new clause in the Missouri Constitution of 1875. The decisions are harmonious. Several of the States which have not made changes as above set forth, yet declare that

the simple expression "just compensation" requires indemnity for damages resulting from operation of railroads in streets. The Supreme Court of Minnesota, in the case of Adams v. the Chicago R. R., 39 N. W. Rep. 629, has collected the authorities, and concludes as follows: "The abutting owner, whether owning the fee in the street or not, necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of his location, such as the right to free access to his premises, and the free admission of light and air to and through his property; where, without his consent, and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by the company laying and operating such railroad on that part of the street." The depreciation of rental or market value is the measure of the damage.

II.

The owner of an abutting lot has a special interest in the street distinct in kind from and in addition to that enjoyed by the public in general. This includes the right of ingress and egress; to light and air; to have his friends and customers come and go without unreasonable hindrance, delay or danger; to stand his teams and vehicles in front of his premises; to load and unload goods, merchandise, fuel, building material, etc.,

and to make every other use of the street that may be usual and reasonable for the accommodation and enjoyment of his property.

Rude v. St. Louis, 93 Mo. 414;
McQuaid v. Portland R. R. (Oreg.), 22 Pac. R. 899;
Branahan v. Hotel Co., 39 Ohio St. 333;
Dillon Mun. Corps., §§730–734;
Pittsburg R. R. v. Vance, 115 Pa. St. 325.

Even before the adoption of the new Constitution, such an occupation of the street as has been presented in the evidence, affecting as it does the access to the property, was considered a taking, and protected by the constitutional provisions then in force. Lackland v. N. Mo. R. R., 31 Mo. 186; 34 Mo. 274.

III.

Where buildings have been erected, adapted to a particular purpose, and a public improvement is made which injuriously affects the property and reduces its market value, such a damage is for public use, and requires compensation to be made.

Chicago v. Taylor, 125 U. S. 161;
Calumet R. R. v. Moore, 124 Ill. 329;
Chicago R. R. v. Bowman, 122 Ill. 595.
Dupuis v. Chicago R. R., 115 Ill. 97;
Centralia R. R. v. Brake, 125 Ill. 393.

If the construction or operation of the railroad renders the adjoining property unsuitable for the business

for which it was constructed, the court should consider as a legitimate element the cost of removal and the interruption to business thereby caused.

Atchison R. R. v. Schneider, 127 Ill. 144;
Phila. R. R. v. Getts, 113 Pa. St. 214.

Where the railroad tracks render access to a mill or factory by teams and wagons dangerous, this is to be considered in so far as it reduces the market value of the property.

Pittsburg R. R. v. Vance, 115 Pa. St. 325.

We ask especial attention to the case of Laflin v. Chicago R. R., 33 Fed. R. 415; 34 Fed. R. 859, which was a claim for damages to premises used as a summer hotel, and especially adapted for that purpose. The court directed the jury to consider the depreciation of the value of the property for the purpose for which it was used when taken.

IV.

If the construction and operation of the railroad produces dust, smoke, noise, vibration and noxious smells, and thereby causes such inconvenience or damage to the occupants and owners of the adjoining property, as to reduce the market value of the property, or to render it undesirable for tenants, then such damages are properly a subject of inquiry.

Adams v. Chicago R. R. (Minn.), 39 N. W. Rep. 629;
Gainsville R. R. v. Hall, 78 Tex. 169;
Chicago R. R. v. Loeb, 118 Ill. 208, and cases collected in Lewis' Eminent Domain, §230; Mills' Eminent Domain (2d Ed.), §193.

V.

The proper remedy is an injunction, until the damage to plaintiff's proprietary rights is ascertained and paid to the owner, or into court for the owner.

The court should enjoin the operation of the railroad in front of complainant's premises.

The Constitutions of all the States call for just compensation for the taking of private property for public use. Many of them do not prescribe the time when the compensation shall be paid, and in such States the court might be reluctant to enjoin a public improvement until compensation shall be paid. The decisions in those States can be no guide on this question. In order that the court may not be embarrassed by the multitude of decisions, we will indicate the States which do not require payment of compensation prior to the taking: They are Illinois, Louisiana, Maine, Massachusetts, Nebraska, North Carolina, New Hampshire, New York, Rhode Island, Tennessee, Wisconsin, Vermont, and Virginia. The other States, by their last Constitutions, require payment in money, or deposit of money or security, prior to any entry or occupation. West Virginia requires prior payment for a taking, and provides a cause of action where property is damaged only. There may be decisions in these States last mentioned which apparently contradict this doctrine, but they were rendered prior to the adoption of Constitutions containing this clause. The language of the Missouri Constitution is: "And until the same shall be paid to the owner, or into court

for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein disturbed."

Prior to the adoption of the Constitution of 1875, the Supreme Court considered injunction the proper remedy for such an injury, without any allegation of insolvency of the defendant. The character of the interference gave a right to equitable relief, and the injured party was not required to rely on an action for damages.

Carpenter v. Grisham, 59 Mo. 247;
McPike v. West, 71 Mo. 199.

Judge Brewer, in McElroy v. Kansas City, 21 Fed. R. 257, considers injunction a proper remedy,

We cite the most recent decisions sustaining the doctrine that an injunction should be granted to restrain operation of a railroad when compensation has not been previously made, or the track removed by ejectment proceedings:

Columbus R. R. v. Witherow, 82 Ala, 195;
Weyl v. Sonoma Val. R. R., 69 Cal. 202;
Macon v. Harris, 75 Ga. 761;
Georgia R. R. v. Ray, 11 S. E. R. 352; 84 Ga. 376;
Cox v. Louisville R. R., 48 Ind. 194;
Terre Haute R. R. v. Rodell, 89 Ind. 129;
Midland Ry. v. Smith, S. Ct. Ind., 15 N. E. Rep. 256;
Harrington v. St. Paul R. R., 17 Minn. 215;
Wagner v. Ry. Co., 38 O. St. 32;
Jarden v. Phil. R. R., 3 Whart. 502;
Borough of Verona, 108 Pa. St. 83;

Monmouth Co. v. Holmdel Tpk. Co., 18 N. J. Eq.——;
Mettler v. Gaston R. R., 25 N. J. Eq. 214;
Railroad v. Angel, 41 N. J. Eq. 316;
Forsyth v. Wheeling, 19 W. Va. 318;
Mason City Salt Co. v. Mason, 23 W.Va. 211;
Mills' Em. Dom. (2d Ed.), §130.

The following authorities support the doctrine in States where the Constitutions do not require payment in advance:

Republican Val. R. R. v. Fink, 18 Neb. 87;
Hull v. C., B. & Q. R. R., 21 Neb. 371;
Kittell v. Missisquoi R. R., 56 Vt. 96;
Phillips v. S. Park Com'rs, 119 Ill. 627;
Chicago R. R. v. Gates, 120 Ill. 86.

Under the new Constitution, the owner is not compelled to rely on his action for damages, although he may bring such an action if he chooses to do so. He may not be in a condition to prosecute a long litigation with a powerful corporation, with the prospect of having the corporation become insolvent before he has obtained his compensation. The Constitution knows no difference between solvent and insolvent corporations, or between the compensation for taking or damaging private property. In either case the compensation must be ascertained and paid before entry or disturbance of proprietary right.

VI.

The ordinance set up by the defendant in its answer as a defense, and the evidence, shows that the track is for the private use of the St. Louis Wire Mill Company, and used only for transporting freight to and from its mill, and that the track is not used by the defendant in its general business as a common carrier, and cannot be used by any other adjoining owner, except by virtue of a new ordinance. Hence the track is for a private use, and the operation of trains should be enjoined for that reason.

To sustain the proposition that the use is essentially private, we refer the court to the case of Sholl v. German Coal Company, 118 Ill. 427. That was a case of a switch to a coal mine. The court say: "In all "such cases, the character of the business proposed to be "done, and the manner of doing it, must be looked into "in determining whether the use will be a public or a "private one. If, from the nature of the business and "the way in which it is conducted it is clear no obli-"gations will be assumed to the public, or liability in-"curred other than such as pertains to all strictly pri-"vate enterprises, it may be safely concluded the use "is private and not public."

VII.

It is the province of the jury to determine, under proper instructions, whether the abutter's easement is obstructed or impaired.

Lackland v. N. Mo. R. R., 34 Mo. 276;
Missouri Constitution, 1875, Art. XII, Sec. 4.

The court below should have considered whether the evidence presented on the hearing was sufficient to allow a case for damages to complainant's property to go to the jury. If the court on the hearing was, or ought to have been, satisfied that complainant's property had been depreciated in value by the laying of the track in Gratiot street, in front of complainant, then the defendant should have been enjoined from constructing and operating its road until the proper compensation could be determined and paid.

The trial court did find that the laying of the track on Gratiot street depreciated the value of complainant's property. (See Opinion of Court, Record page 123.)

The court having found that the value of complainant's property had been and was depreciated in value by reason of the track on Gartiot street, that was as far as it could lawfully go or find in relation to such damages, for, by the terms of the Constitution of Missouri, the extent of such damages is purely within the province of a jury to find, and for the further reason that by strict and positive rulings of the court at the trial of this cause all evidence looking to the extent of the damages was excluded. (See Record, pages 18 and 40.)

The further statement in the opinion of the court, viz: "That the use of the track has not seriously obstructed, "and will not in future seriously obstruct, access to "complainant's premises, and that the damage done "to its property in the way of lessening its market or "rental value is in any event small" (see Record, page 123), is a statement in relation to matters that

were not before the court in any manner, and could not be considered by the court, as by the rulings of the court the question of the extent of the damages was not before the court.

The question, and the only question, before the court was: Has complainant's property been damaged, has it been depreciated in value by the placing of the track on Gratiot street?

Having found that the premises had been and were damaged, as the court did find, the defendant should have been enjoined from constructing and operating its road on Gratiot street until such time as the damages to complainant had been legally determined and paid.

VIII.

The action of the court in denying injunctive relief and dismissing complainant's bill was against the law and against the evidence, and against equity and good conscience.

The finding of the court that the property of complainant had been damaged, had deteriorated in value, by reason of defendant having placed the track upon Gratiot street, was equivalent to finding that the defendant was a trespasser, a wrong-doer; that it had committed an unlawful act; and even if it be true, as stated by the court (see Record, page 12), that there is "no proceeding which the defendant can take to obtain "an assessment of damages, that complainant has or "will sustain by the location and operation of the track "in Gratiot street," this cannot be a good and sufficient reason why a court of equity should excuse such wrong-

ful acts of the defendant; nor will the fact that "com-"plainant has an adequate remedy by an action at law "to recover such damages," even if it be true, justify a court of equity in refusing to enjoin the defendant, when the provision of the Constitution of the State of Missouri forbids *all* occupation and disturbance of the proprietary rights of abutting owners until the damages are assessed and paid.

If the complainant, at the time of the filing of its bill and service of process on the 16th day of February, 1887, and up to the 20th day of March, 1887, the time when the track was laid, was entitled to a preliminary injunction on the pleading and evidence produced at the trial, as declared by the trial court in opinion filed (see Record, page 124), that right still existed at the time of the trial of the case, the bill praying for an injunction having been filed and process served the defendant more than 30 days before the defendant did the thing complained of in the bill and threatened at the time of the filing of the bill.

The only reason assigned by the trial court for refusing injunction and dismissing bill in the opinion filed, hereinbefore set out in full, is that the complainant did not make application for a temporary injunction; and in support of that position cites four authorities, viz:

Bassett v. Company, 47 N. H. 436;
Midland Railway v. Smith, 15 N. E. Rep., 256;
2d Wood Railway Law, page 794;
1st High on Injunctions, page 7, Sec. 7.

That the court erred in the authorities, and that they do not bear out the views of the court, is clearly manifest from an examination of the authorities cited.

Bassett v. Company, 47 N. H. 436.

The complainant had allowed his land to be overflowed for seven or eight years before making his application for injunction, during which time the defendant had erected extensive and costly mills to be run by the water-power. Here was an acquiescence for a long time.

That is not an authority to deny an injunction where the application was made before the railroad company had done a stroke of work. The defense of laches is that the complainant has acquiesced without opening his mouth to protest or warn the defendant from committing the unlawful act. If, before the commission of the unlawful act, the complainant brings his bill to restrain the contemplated injury, and after the service of the complaint on the defendant, the defendant in defiance of complainant's protest commits the injury, before the case can be reached for hearing, then in such a case the defendant could not plead laches, and the court could not volunteer such a defense in defendant's behalf. Besides, the relative value of the improvements and the injury to complainant's land was considered in the Bassett case. In the case at bar the buildings of complainant were of vastly greater value than the cost of iron rails and ties, to make a switch on a level street for the length of two or three city blocks. The track is not a main line or a portion of it, but a switch con-

nection with one large business establishment. We consider it also a proper subject of comment that the Constitution of New Hampshire does not contain any clause on the subject of eminent domain similar in purpose to that contained in the Missouri Constitution. The defendant in this case assumes to do the act complained of by virtue of the public power of eminent domain delegated to it. It, however, violates and defies the mode in which the Constitution allows property to be damaged for such a purpose.

The case of Midland Ry. v. Smith, 15 N. E. Rep. 256; 113 Ind. 233, does not support the proposition of the court below. The Supreme Court of Indiana, in the case cited, holds distinctly that if the entry had been recent, that the construction and operation of the railroad should have been enjoined; but, on examination of the facts of the case, it appeared that the road had been constructed for several years and in regular operation, and that complainant himself had, under contract with the railroad company which was the predecessor of the Midland Co., graded for the line over the tract of land in question. For him, after several years of acquiescence, to bring an injunction proceeding, would certainly meet with the disapproval of a court of equity. The ground of the refusal of an injunction in that case was that the land-owner had consented to the construction some years before he had filed his suit. In the case at bar the complainant promptly filed its bill before a stroke of work was done. To say complainant should have no relief because it did not furnish a heavy bond and obtain a preliminary injunction, is to

indicate that equitabte relief can only be afforded to the wealthy and influential, and that the rights of all other litigants are extinguished by the failure to give a preliminary bond.

As to the authorities cited in 2 Wood Ry. Law, 704, we state that the authorities cited by us in this brief, where injunctions have been granted for injuries similar to those complained of here, are more recent, and, therefore, express more truly the present state of the law on the subject. In none of them has the court refused to grant relief on the ground that the act complained of had been committed between the filing of the bill and the hearing on the merits, on the ground that there was laches or acquiescence, because the complainant had not given a bond and obtained an injunction on filing the bill.

The citation in 1 High on Injunctions, page 7, Sec. 7, is thoroughly good law. The laches, delay and acquiescence, there alluded to refers to laches, delay, or acquiescence, after the act complained of has been committed, and before complainant files his bill.

When a notice is given of an application for an injunction, the defendant has a right to come into court and anticipate the rule day.

Walworth v. Board of Supervisors, 5 Biss. 133.

It may be good railroad practice after service of the bill to immediately commit the anticipated wrong, but it is certainly not good equity practice, and should not be recognized and tacitly treated as a sharp and commendable trick by the court in which the bill is filed.

In the opinion filed the court say: "Even when "there are some grounds for such relief, it is in a meas- "ure discretionary with the court to grant or with- "hold it."

This position may be correct in so far as preliminary injunctions are concerned, but there are many cases, and the one at bar is one, where injunctive relief is in no manner discretionary on final hearing, but is a matter of strict right.

In the case of N. Y. Printing and Dyeing Estab. v. Fitch, 1 Paige Ch. 97, the chancellor says: "There "are many cases in which the complainant may be en- "titled to a perpetual injunction on the hearing, where "it would be manifestly improper to grant an injunction "*in limine*. The final injunction is in many cases "matter of strict right, and granted as a necessary con- "sequence of the decree made in the cause. On the "contrary, the preliminary injunction, before answer, "is a matter resting altogether in the discretion of the "court, and ought not to be granted unless the injury "is pressing and the delay dangerous."

IX.

The evidence produced at the trial of the cause establishes the fact that the premises of complainant have been damaged, and the value thereof depreciated, and sustains the allegations of the bill.

On the whole case, the decree of the Circuit Court should be reversed, and this court should enjoin the defendant from using its tracks in front of complainant's premises, or direct the Circuit Court so to do,

until the damages to complainant's property are ascertained and paid according to the provisions of the Constitution of the State of Missouri.

J. E. McKEIGHAN,
H. E. MILLS,
P. R. FLITCRAFT,
Counsel for Appellant.

147252

Office Supreme Court U. S.
FILED.
DEC 5 1892
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 95.

D. M. OSBORNE & COMPANY,

Appellant,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY,

Appellee.

BRIEF FOR APPELLEE.

JOHN F. DILLON,
WINSLOW S. PIERCE,
Counsel for Appellee.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

until the damages to complainant's property are ascertained and paid according to the provisions of the Constitution of the State of Missouri.

J. E. McKEIGHAN,
H. E. MILLS,
P. R. FLITCRAFT,
Counsel for Appellant.

147S248

Office Supreme Court U. S.
FILED.
DEC 5 1892
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 95.

D. M. OSBORNE & COMPANY,

Appellant,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY,

Appellee.

BRIEF FOR APPELLEE.

JOHN F. DILLON,
WINSLOW S. PIERCE,
Counsel for Appellee.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

NO. 95—OCTOBER TERM, 1892.

IN EQUITY.

D. M. OSBORNE & COMPANY,
Appellant,

AGAINST

THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellee.

BRIEF FOR APPELLEE.

Statement.

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Missouri, dismissing complainant's bill of complaint.

Complainant's bill, filed on February 16th, 1887 (Record, p. 1), alleged that the railway company was about to commence the construction of a track along Gratiot street in the City of St. Louis, Missouri, from the main tracks of the railway, at a point near Twenty-third street, to the property of the St. Louis Wire Mill Company, near the corner of Twenty-first street, and

proposed to construct the same in front of the building on Gratiot and Twenty-second streets, owned and occupied by the complainants, and in front of a vacant lot adjoining this building, which was also owned by the complainants and on which they intended to erect a building similar to the one then occupied by them; that, if proposed building were built according to the original plan, there would be no entrance to the same on any street except Gratiot street; that by reason of the railway track and the operation of the same the complainants and the public would be prevented from using the street "as allowed by law," and that travel would be diverted and turned away from the street; that it would be impossible for a wagon and team to remain on the Gratiot street front of complainants' property while cars were being moved or might be standing on the same, and that it would not be safe to use street by teams or wagons, all of which was alleged to be "to the great unascertainable and irreparable damage" of complainants' business (Record, pp. 2, 3). The bill further alleged that the noise, smoke, danger from fire and from shaking and vibration of the building caused by the passing of cars and locomotives in front of complainants' premises would render the same less desirable and valuable to them as a place of business. The final allegation is that "the construction of said railroad track and the operation of the same will reduce the market value of the property of your orator and damage the same in a sum in excess of thirty thousand dollars." The prayer for relief is:

"That said defendant be restrained and enjoined from commencing or carrying out the proposed construction of any railroad track or switch, or from tak-

ing possession of said Gratiot street for said purpose, or from using said Gratiot street to the exclusion of your orator and the public, and for all such other and further relief as may be necessary and proper" (Record, p. 4).

On the 8th day of October, 1887, the defendant filed its amended answer, specifically denying the allegations of complainants' bill; and for further answer averred that the track was laid in pursuance and by authority of an ordinance of the said City of St. Louis, approved February 18, 1887, which said ordinance is set out in full in the answer (Record, p. 7).

The complainants filed on May 8, 1888, their exceptions and demurrer to the amended answer (Record, p. 9), which exceptions and demurrer were overruled (Record, p. 10). To the order overruling exceptions and demurrer, no exception appears to have been taken. On June 9, 1888, the complainants filed a replication to the answer.

This cause was brought on for trial on the 31st day of January, 1889, nearly two years after the filing of the bill of complaint.

No temporary injunction had been obtained or sought by complainants.

THE EVIDENCE.

Upon the trial it was conceded that the track was laid shortly after the bill was filed (Record, p. 12).

It is also conceded that complainant was not asking damages in this proceeding. On page 12 of the Record the following appears:

MR. MILLS [*Attorney for Complainant*]: The track was laid, your Honor, on March 20th, and the question is now whether or not the Court, in its equity power,

will enjoin the defendant from using that track, for the reason that it was improperly laid, laid without authority of law, laid whenthey had notice that we objected to it, and when they had been served with an injunction to prevent them from entering there.

MR. PORTIS [*Attorney for Defendant*]: Not with an injunction.

MR. MILLS: With this bill asking for an injunction.

THE COURT: That issue of fact is now out of the case as I understand. It has been stipulated between you that this track was, in point of fact, laid ten days after the bill was filed.

MR. FLITCRAFT [*Attorney for Complainant*]: Yes, your Honor; more than thirty days.

THE COURT: That issue of fact, then, is out of the case. Now, the question arises, what are we to try in this case? If, assuming that your view of the case is correct, there were damages inflicted here by the laying of the track that are within the Constitution of the State—such damages as the defendant is bound to pay—then it becomes a very doubtful question whether, in a proceeding of this kind, the Court can itself ascertain those damages and direct that they be paid.

MR. MILLS: *We are not asking that in this proceeding.*

No proof of any actual or specific damage to complainant's *business* was offered.

The lawful authority of the defendant to construct the track in question was shown by the evidence. The ordinance of the City Council authorizing the construction, provided that the privilege of using the track should be extended to any persons or company (other than the St. Louis Wire Mill Company) having property on Gratiot street, and it also provided that other railroads should have a right to connect their tracks with the switch and to use the same. (It is suggested at page 50 of brief for complainant that the track was constructed exclusively for private use. Upon this point it is unnecessary to do more than to refer to the

terms of the ordinance itself, the substance of which is above stated. The ordinance is set forth in full in defendant's answer at page 7 of the Record.)

There was no proof of improper or unskillful construction or operation of the railroad, although complainant apparently relied to some extent upon a special inconvenience claimed to exist by reason of the approach of the track to the curb line on the southwest corner of his premises an unavoidable and legitimate method of construction where the line is required to be *curved*, as in the present case, out of a narrow city street (see map, Record, pp. 90, 91). *There was no allegation or proof that the track was constructed in any other than the ordinary way upon the surface of the street, without change of grade or other disturbance.*

The testimony showed that both before and after the construction of the track complainant continuously used the Twenty-second street entrance (and not the Gratiot street entrance) to their building for receiving and shipping goods.

Record, pp. 57, 58, 63, 66, 67.

It was also shown that the track was used by the railway company in a reasonable and proper manner at reasonable hours and but for a short time (averaging about half an hour) each day (Record, pp. 63, 64, 67, 81).

There was a conflict of testimony as to whether the value of complainant's property had been enhanced or lessened by reason of the construction of the track or switch.

Three experienced real estate men, introduced as witnesses for defendant, testified that the construction

of the track had enhanced the value of the property (Record, pp. 69–80). A like number of real estate men, almost equally experienced in point of years, who were introduced as witnesses for defendant, testified that in their several opinions the construction of the switch had a tendency to diminish the value of the property (Record, pp. 37–45).

The record shows no exceptions taken to any rulings of the Court admitting or rejecting testimony.

Conclusions and Decree of the Court Below.

The conclusions of the court below upon the facts of the case are thus stated in Judge Thayer's opinion (Record, pp. 88–90):

"The testimony no doubt tends to show that the existence of a railroad track in Gratiot street lessens the value of complainant's property to some extent. Such depreciation in the value of the property seems to be largely due to the fact that the track is not laid for the full distance in the center of the street, but inclines to the north and cuts the curb line at the west boundary of complainant's premises. That fact may lessen the value of the unimproved portion of complainant's lot and render it less marketable than it would otherwise be.

"It may also be that the track along Gratiot street slightly interferes with the convenient receipt and delivery of goods at the south entrance of complainant's building on said street.

"There is some testimony before the Court to that effect; *but the inconvenience resulting from such interference is evidently very slight. I will also add that it is by no means certain that the value of complainant's property is impaired in the manner above stated. Opinions pro and con were expressed on that point by the various witnesses. A jury called to try the issue and assess the damages might reasonably find that no damage had been sustained in consequence of the laying of the track or that the damages were inconsiderable.* The Court is of the

opinion that the use of the track has not seriously obstructed, and will not in future seriously obstruct, access to complainant's premises, and that the damage done to its property in the way of lessening its market or rental value is in any event small."

In view of the foregoing considerations, and in view also of the absence of any proceeding available to defendant under the law of Missouri for the assessment of such damages, while on the other hand the complainant had adequate and simple remedy by an action to recover such damages, if any, as it might have suffered; and in view of the consideration that the track was laid pursuant to legislative and municipal authority and was in no sense a public nuisance, and that the defendant certainly had the ultimate right to use it on condition of paying such damages as abutting proprietors might have sustained; and in view of the fact that complainant had made no application for a temporary restraining order and that the track had been constructed and in operation for nearly two years before the case was brought to trial, and upon balancing the inconvenience of the parties entitled to protection, the Court held that injunctive relief should not be granted, but that the complainant should be remitted to its remedy at law, and it directed that a decree be entered dismissing the bill without prejudice to complainant's right to sue at law for the damages which it claimed to have suffered.

ARGUMENT.

1. Under the settled law of the State of Missouri the defendants' use of the street under legislative and municipal authority was lawful, and conceding, for the argument, that the property of complainant may have been to some extent injuriously affected, the damage was, under that rule, absque injuria.

That there was adequate legislative and municipal authority for defendant's construction of the track in Gratiot street, is not denied or disputed.

Judge THAYER, in his opinion (Record, p. 86), thus states the law of Missouri:

"In Missouri, however, for many years railroad companies have been authorized by general law to use the streets of cities or villages for the purpose of laying their tracks provided they are granted such privileges by the municipal authorities" (vide Sec. 765, Revised Statutes of Missouri, of 1879).

This was the section in force when the municipal ordinance, approved February the 18th, 1887, set out in the record (pp. 7 and 8), was adopted. This section (§ 765) of Revised Statutes of Missouri of 1879, being Article 2 relating to railroad companies, provides:

"Every corporation formed under this article shall, in addition to the powers hereinbefore conferred, have power * * * to construct its road across, along or upon any stream of water, water course, street, highway, plank road, turnpike or canal which the route of its road shall intersect or touch; but the company shall restore the stream, water course, street, highway, plank road, turnpike or canal thus intersected or touched to

its former state, or to such state as not unnecessarily to have impaired its usefulness. Nothing herein contained shall be construed to authorise the construction of any railroad not already located in, upon or across any street in the city or road of any county without the consent of the corporate authorities of said city or the county court of such county."

These provisions are re-enacted and continued in the Revised Statutes of Missouri of 1889, passed since the adoption of the Constitutional Amendment (see Revised Statutes of Missouri of 1889, Section 2543). So, in Article No. 2, Chapter 89, page 878, Section XI., of the Revised Statutes of Missouri of 1879, in relation to cities, towns and villages, it is expressly provided that cities shall have "sole power and authority to grant to persons and corporations the right to construct railways in the city, subject to the right to amend, alter or repeal such grant in whole or in part." This provision is re-enacted in the Revised Statutes of Missouri of 1889, page 321, Section XI., in precisely the same language.

The only question is whether the defendant was not bound, as a condition precedent to the exercise of the right given by the statute and the city ordinance, to pay to complainant, as owner of abutting property, damages for such incidental inconvenience or injury as it may have suffered by reason of the construction of the road. The claim of the complainant in this respect is founded upon Section 21 of Article 2 of Missouri Constitution of 1875, which is as follows:

"That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and, until

the same shall be paid to the owner or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested."

A fundamental question in this case,—and, as we believe, a question the answer to which will be found to be conclusive upon the plaintiff's case,—is whether the damages (conceding their existence) of which the plaintiff complains are within the contemplation of the constitutional provision above quoted. They are not, it will be found, of the nature contemplated by that provision.

It is the settled rule of decision of the highest court of Missouri that the construction of a steam-railroad track in the ordinary way upon the surface of the streets of a municipality is a legitimate and ordinary and not a perverted use of the street, and does not impose a new burden or servitude; and that the inconvenience or injury which the owners of abutting property may suffer by reason of such construction is not of a nature for which compensation is demandable either before or since the above quoted provision of the Constitution was adopted.

This rule is uniformly adhered to by the Supreme Court of Missouri in all cases where the construction of the railroad is upon the surface of the street and does not involve unusual or extraordinary structures, excavations or changes of grade.

Cases where damages have been claimed by reason of changes in the grade of the street involve a wholly different principle (see Dillon, Munic. Corp., 4th Ed., Secs. 995–995*c*, where the decisions *in street grade cases*, including those of this Court, before and since the "damage" clause in the newer constitutions, are

cited and reviewed). The brief of counsel for complainant abounds with cases of this description, but they are inapplicable to the present case. Their inapplicability is illustrated in the decision of the Supreme Court of Missouri in the case of *Julia Building Association vs. Bell Telephone Company*, from which we quote at length at another page of this brief (see *post*, p. 13; also p. 12, *note*). The distinction between cases denying the right of abutting proprietors to damages for the ordinary construction of a steam railroad track upon the surface of the street, and those recognizing such right where the grade is changed, or an unusual or unlawful structure erected or maintained, is clearly pointed out fn the case of *Fobes vs. The Rome, Watertown and Ogdensburg R. R. Co.*, 121 N. Y., 505. In that case the Court of Appeals of New York review the *Elevated Railroad cases* (beginning with the *Story* case, 90 N. Y., 122), and point out the special considerations entitling abutting owners to damages in those cases. The decision in the Elevated Railroad cases are harmonized with that in this case (*Rome, Watertown and Ogdensburg* case), in which it was held that abutting owners are not entitled to damages by reason of the inconvenience or injury resulting from the ordinary construction of a steam railroad upon the surface of the streets of a city.

It is not worth while to review at length the decisions of the Supreme Court of Missouri upon this point. We refer in a footnote to all of the decisions of the Supreme Court of Missouri before and since the Constitution of 1875, which we have been able to find, bearing upon Proposition I. of this brief. We also

refer therein to the statutes of the State showing that the fee of lands dedicated for streets is in the city and not in the abutting owner.*

---

* The case of Ransom vs. Citizens' Ry. Co., 104 Mo., 375 (1891), was a suit brought by the owner of an abutting lot to enjoin a street railway company, having one track on the street, from laying another. The bill was dismissed. In this case it was held that :

"Such a street railway as this, so laid and operated as not to materially impair access to, or the enjoyment of, the adjacent property, may lawfully be placed in the public highways of a city if expressly sanctioned by the proper authority. Such a use does not impose any additional burden entitling the owner of adjoining land to compensation, nor can it be justly regarded, at the present day, as any substantial impairment of the public easement or of the private rights of proprietors of land abutting on the street."

Glassner vs. Anheuser-Busch Brewing Assn., 100 Mo., 514 (1890), was a case in which the Brewing Association (a private corporation) was about to construct a switch into its brewing establishment, over which freight cars were to be run, both loaded and empty. The plaintiff filed a bill to enjoin the construction of the tracks on the street leading to the brewery, and the Court held that the suit could properly be maintained, because a private corporation had no power to construct a railroad. In its opinion, however, the Court used the following language :

"It has been held in a number of cases in this Court that a steam railroad, built and operated upon a street in a city or town by legislative authority, is not a nuisance (Porter vs. Ry., 33 Mo., 128; Randle vs. Ry., 65 Mo., 325; Cross vs. Ry., 77 Mo., 318). But in all of these cases the railroad was a public corporation, and it was considered that the use of the streets for such purposes was not a perversion of the highway from the purpose for which it was dedicated."

In Julia Building Association vs. Bell Telephone Company, 88 Mo., 258 (1885), bill for injunction was filed by an abutting land owner to restrain the erection and maintenance of telephone poles and wires on sidewalk. The bill was dismissed, and judgment affirmed by the Supreme Court. In this case the Court held that, where the public acquires a street in a city, either by condemnation, grant or dedication, it may be applied to all purposes consistent with the proper use of a street. It is only when the street is subjected to a new servitude, inconsistent with and subversive of its proper use as a street, that the abutting land owner can complain, and that

"Railroads operated by steam are permissible, because such

It will be found that all of the cases in Missouri are in harmony with the decision of that Court in the case of *Julia Building Association vs. Bell Telephone Company*, 88 Missouri, 258. It is not worth while to discuss the distinction recognized in so many judicial decisions as between rights where the ownership in the fee of the street is in the municipality and rights where such ownership is in the abutting proprietor. In *The Julia Building Company case* it was stated that the abutting owner was also owner of the fee to the centre of the street. In that case the plaintiff, as owner of property abutting on Sixth street, and as such, the owner of the fee in the street, sought to enjoin the Bell Telephone Company from placing its poles and wires upon the street in front of its property. The Court said:

---

methods of transportation and travel are among those to which the street may be properly applied, as not being inconsistent with its free and unrestrained use" (Randle vs. Ry., 65 Mo., 325; Railroad vs. City, 66 Mo., 228; Porter vs. Ry., 33 Mo., 128; Lackland vs. Ry., 34 Mo., 259; Tate vs. Ry., 64 Mo., 150).

In Cross vs. St. L., K. C. & N. Ry. Co., 77 Mo., 322 (1883), an abutting land owner sued for damages to his lot by reason of a railroad in the street, *above grade*. It was held that he was entitled to recover, but that if the railroad had been laid at grade no right of action would have existed, the Court saying:

"Conceding the right to lay the track in the street and its proper construction at the grade of the street, the company was not liable for any inconvenience to property holders resulting from a proper and prudent operation of the road."

The case of Swenson vs. City of Lexington, 69 Mo., 166 (1878), was also a suit by an abutting property owner for damages caused by the construction of a railroad embankment on a street, *above grade*. Held, that the city was liable, but it was said that—

"If the railroad embankment had conformed to the grade of the street, and, in other respects, had been so constructed as to occasion no greater inconvenience than would result from the mere construction and operation of a railroad along the street, neither the company nor the city would have been liable."

" Under the above state of facts it may be conceded that inasmuch as the plaintiff is the owner in fee of the land abutting on Sixth street, that it is, under the laws in force in 1816, also the owner in fee to the centre of said street. While this is so, such ownership is subject to all the uses to which such street can be properly devoted under the dedication made by Chouteau and Lucas in 1816. * * *

" If it be true, as laid down by the authorities herein cited, that when the public acquires the right to a street, either by dedication, grant or condemnation, the municipality has the power to appropriate it, not only to such uses as are common and in vogue at the time of its acquisition, but also to such new uses as advanced civilization may suggest as conducive to the public good, the conclusion is inevitable that the use of Sixth street in the manner and for the purposes proposed is allowable, for it cannot, with any show of reason, be denied that the means these appliances would afford for the instantaneous transmission of communications for the transaction of business, without resorting to the slower and common methods of bearing

---

Randle vs. Pac. R. R. Co., 65 Mo., 325 (1877) was a suit by an adjoining land owner for damages to his hotel by the escape of soot, smoke, &c., from passing trains. In this case the Court held that:

" Where a railroad is built in a public street the escape of soot, smoke and smells from the locomotives, the obstruction of the streets with cars, and the jarring of the earth and neighboring buildings by passing trains, to the inconvenience, discomfort and danger of adjoining proprietors, do not, in law, constitute a nuisance if the charter of the company authorizes the laying of the track, unless the road is negligently and unskillfully built or operated."

The case of Tate vs. M., K. & T. Ry. Co., 64 Mo., 149 (1876), was a suit by an abutting land owner for damages caused by the construction of a railroad in a street, *above grade*. Held, that plaintiff was entitled to recover because the road was improperly built above grade; but, in its opinion, the Court says:

" Where a municipal charter so allows, a railroad may be constructed on a street by permission of the municipal authorities, and neither the municipality nor the railroad company will be responsible for the inconvenience and damage resulting from such construction. But this rule applies only to a railroad constructed on the grade of the street, where the only obstruction is the passage of the trains, and not where embankments have been made

them, would be conducive to the public good, and make the street, by these means, serve one of the chief purposes for which it was dedicated. * * *

"Take the case of a street horse railroad, with its rails permanently imbedded in the centre of the street upon which its cars are placed, confined to the track between its rails, drawn by horses or mules along the entire length of its line during all the time the street is being generally used, and incapable of being turned either to the right or left, except at its tracks or turnouts, and we have a serious and permanent obstruction to the free use of the street by footmen, horsemen, carriages and wagons; and yet it has been held not only that such an obstruction, but railroads operated by steam, are permissible, because such methods of transportation and travel are among those to which the street may be properly applied, as not being inconsistent with its free and unrestricted use *(Randle vs. Railroad*, 65 Mo., 325; *Railroad vs. The City of St. Louis*, 66 Mo., 228; *Porter vs. Railroad*, 33 Mo., 128; *Lackland vs. Railroad*, 34 Mo., 259; *Tate vs. Railroad*, 64 Mo., 150*)*. * * *

---

above the grade, or where the street is used for side tracks or other structures for the convenience of the road."

Of the cases above quoted, the one in which there is the most full discussion of the questions involved is the case of the Julia Building Association vs. Bell Telephone Company, 88 Mo., 258. Especial reference is, therefore, made to that case, and to the case of Ranson vs. Citizens' Ry. Co., 104 Mo., 375, above cited.

It will be noted that all of the above cases were decided since the adoption of the Constitution of 1875, and the principle established by these cases is the same as that laid down prior to the adoption of this Constitution.

Lackland vs. N. Mo. R. R., 34 Mo., 359 (1863), was a suit by an adjoining land owner for damages resulting from obstruction of a street by a railroad company, and where the Court held that:

"A railroad having the right to use a public highway for the ordinary purposes of a railroad, as a means of travel and transportation, is responsible to adjoining proprietors only for using it in an illegal manner."

In Porter vs. N. Mo. R. R., 33 Mo., 128 (1862), an abutting land owner brought suit for damage to his property by the obstruction of a street with a railroad track, and it was held that:

"While, *in this State*, laying down the rails of a railroad operated by steam in the streets of a town or city, when authorized by the Legislature, *is deemed to be a use not inconsistent with the proper use of such streets*, the Courts of New York and Illinois have held otherwise as to railroads operated by steam, but not as to street horse railroads. * * *.

"But it is argued that, as by Article 2, Section 21, of our Constitution, it is provided that private property shall not be taken or damaged for public use without just compensation,' that, even though plaintiff's private property is not taken in erecting the poles in question, that plaintiff must be compensated for any damage resulting from their erection which is peculiar to its adjacent property. If the conclusions announced in the foregoing part of this opinion, that all the uses to which a street may properly be devoted are to be regarded as permitted by and included in the original appropriation or dedication of the street, and that the erection and maintenance of telephone poles as proposed is one of these uses, and that in digging holes through the stone slabs and stone walls in which to plant them,

---

"The use of a railroad, under authority of its charter, of a street, in its ordinary use as a means of travel and transportation, is not a perversion of the highway from its original purposes. Any damage to the property abutting on the street, resulting from the obstruction, is *damnum absque injuria*."

In Dubach vs. Han. & St. J. Ry., 89 Mo., 483 (1886), the Legislature had authorized a railroad to lay its track on the streets of a city, with the requirement, however, that it should be so constructed "as not to hinder or prevent the public from using the "street." In this case it was held that if the character of the street be such that the track could not be laid without hindering the public from using it, such track could not be laid thereon, however important it might be to the company to use the street. It was further held that a city cannot authorize such a use of a street dedicated for that purpose as will destroy its use as a public thoroughfare, and that an abutting owner sustaining special damages from the improper appropriation of a street can maintain an injunction to restrain such use. It will be noted, however, that in this case the charter of the company only authorized it to lay its tracks upon streets where the work would not result in *hindering or preventing the public from using the streets*. This was a very material limitation upon its authority, and as the facts of the case clearly show

there is no taking of private property of the abutting lot owner entitling him to compensation, are correct, it would seem logically to follow that damages resulting from such use need not be compensated for. If by reason of the dedication the public have the right to apply the private property of the plaintiff to the use proposed, without his being entitled to compensation, how can it be that it becomes entitled to compensation for damages flowing as an incident from an act which the dedicator by his dedication has authorized to be done? * * *

"If the dedication of the street is sufficiently operative to allow private property in the soil of the street to be actually invaded, and physically taken for a street use without compensation, why is it not sufficiently operative, if in such taking damages ensue, to relieve the taker from the payment of such damages? If, by dedicating property for a street, the dedicator gives up his right to compensation for the uses included in the dedication, how can it be said that he does not also give up his right to compensation for damages to adjacent property not taken, resulting from the applica-

---

that the laying of the track would seriously interfere with the use of the street by the public, and would prove a serious damage to the abutting property owner complaining, the decision of the Court must be supposed to rest on these special facts and circumstances. It would seem, however, not to be applicable to a case like the present one, where no such limitation was placed upon the power of the company to construct its tracks.

In Chicago, Santa Fe and Cal. Ry. Co. vs. Miller, 106 Mo., 459 (1891), which was presented to the Court on exceptions to a Commissioner's report in a proceeding to condemn land, it was held that Section 21 of Article II., as to property "taken or damaged," is general in its terms and must be taken in connection with Section 4 of Article XII., which guarantees a trial by jury in all such cases where an incorporation is interested, and that the latter clause must control.

Under the laws of Missouri, the fee to lands dedicated to public use for streets and highways is not in the abutting property holders, but is in the State, or the city or county, as agent for the State, for the use of the public.

See

A. & P. R. R. Co. vs. St. Louis, 3 Mo. App., 316.
Same vs. Same, 66 Mo., 228; 73 Mo., 295.

tion of the street to a use which, by his dedication, he authorized it to be put? Without returning, but waiving an answer to these questions, let it be conceded for the purposes of this case, as is contended by counsel, that it has been held by this court in the cases of *Werth vs. City of Springfield*, 78 Mo., 107, and *Householder vs. City of Kansas*, 83 Mo., 488, that damages resulting *from changing the grade of a street can be recovered* by an adjacent lot owner, *yet such damages to be recoverable*, as was said by *Dickey, C. J.*, in his concurring opinion in the case of *Rigney vs. City of Chicago*, 102 Ill., 64, relied upon and cited by counsel, *must be real and substantial and flow from a sudden and extraordinary change of grade, and not from such improvements of the street in any ordinary and reasonable mode deemed beneficial to the public good, for as to these the lot owner must be assumed to have consented.*"

See also

General Statutes Mo., 1825, Title Town Plats, Sec. 3, p. 763.
General Statutes Mo., 1835, Title Town Plats, Sec. 4, p. 599.
General Statutes Mo., 1845, Chapter 176, Sec. 6, p. 1056.
General Statutes Mo., 1855, Vol. 2, Sec. 8, p. 1536.
General Statutes Mo.. 1865, Chapter 44, Sec. 8, p. 348.
Wag. Stats. Mo., 1872, Sec. 8, p. 1328.
Revised Statutes of Missouri, 1879, Sec. 6573, p. 1288
Revised Statutes of Missouri, 1889, Sec. 7313, p. 1700.

For the law as to the right of abutting owners to compensation for property taken for public use as affected by the question whether the fee in the street is in them or in the municipality, see Sections 702-704*a*, 724-726, Dillon on Municipal Corporations (4th Ed.), and the following recent cases:

Railroad Company vs. Bingham, 87 Tenn. (3 Pick.), 522.
Kan., Neb. & Dakota Ry. Co. vs. Cuykendall, 42 Kan., 234.
Same vs. McAfee, 42 Kan., 239.

The Tennessee case, above cited, was one which arose out of the construction of the Iron Mountain Railroad on Kentucky avenue in the city of Memphis, and where an abutting property owner claimed damages. The decision turned upon the ownership of the fee. The opinion rendered by the Court in the case is a very well-considered one, and cites numerous authorities showing that the decision is in accordance with the established rule.

In their brief for complainant, counsel refer to the *Julia Building Association* case as having been decided by a "divided court," and they say that "the dissenting opinion is the better law," and that it is in accord with the decisions of other States, where similar constitutional provisions exist. If the decisions of courts of some other States hold a contrary doctrine, it may or may not be that their conclusions rest upon reasoning better commended to the approval of counsel, and, perhaps, to general approval. With this we have nothing to do. The conclusive considerations here are that in the case from which we have quoted and in the others referred to in this brief, *we find the interpretation and effect of the constitutional provision in question declared by the highest judicial authority of the State*, and that neither prior to nor since that decision has there been a departure in that Court from the rule so declared.

The rule is reaffirmed in the case of K. C., St. J. & C. B. vs. St. J. Term. Ry. Co., 97 Mo., 457–468–9.

In this case the City of St. Joseph had condemned, for street purposes, a strip of land across plaintiff's property upon which were located six of its tracks. Plaintiff was the abutting owner on both sides of the new street. Subsequently the City, by ordinance, granted to the defendant the right to construct, use and maintain a track along the new street. When the work of construction approached plaintiff's tracks, plaintiff brought its bill to restrain defendant from entering upon, or interfering with them, on or over the street. The Circuit Court granted the injunction, but upon appeal the Supreme Court reversed its decision and directed it to dismiss the bill.

The Court said:

"As to the first of these rights, it may be said, if, by virtue of that decree, Fourth street, as located across the plaintiff's property, became a public street in the usual and ordinary acceptation of the term, and as used in the statute, then the plaintiff's easement therein *as abutting proprietor* can in no way be damaged by the construction of defendant's road, since during its construction it is not proposed to disturb plaintiff's passway, and afterwards it will have the same free and unobstructed use of the street as it had before, by the same vehicles drawn upon the same tracks; and every one that desires will have the same unobstructed ingress to and egress from the plaintiff's abutting premises that they had before. The only damages that can be conceived of, or that is suggested to such easement, must flow from the operation by the defendant of its track in the street in its business and the delay plaintiff's trains at times will be subjected to in crossing the street by reason of the occupation in the street by defendant's trains of the same space at which it desires to and can alone cross with its trains. But that space being in a public street, *the defendant's tracks having been authorized to be laid by the city, its use by the defendants for the purposes of passing to and fro over it with its trains is a legitimate use belonging to the defendant company, as well as to the plaintiff, in common with every other citizen desirous of passing over it with his vehicles. The damage caused by such delay is of the same character as that suffered by every traveler on a public highway whose movements are retarded by those of another traveler on the same highway, is not peculiar to an abutting proprietor, although, by reason thereof, he may more frequently have use for, and be more frequently delayed in his movements in the street than other citizens. The damage resulting from such delay and inconvenience is not the subject of compensation within the meaning of Article 2, Section 21, of the Constitution.*"

But the foregoing considerations are not the only ones which are conclusive upon complainants' case.

II. Complainant's case was not established. Injunctive relief will not be granted in a doubtful case.

If we are mistaken in the last proposition—namely, that, under the legislative and municipal authority, the defendant was entitled to use the street in the manner proposed, and that the complainant's case is not within Sec. 21, Art. II. of the Constitution—nevertheless, upon the established principles of equity, the complainant was not entitled to the injunction sought. The injunction asked for was to protect an alleged legal right, and not to protect some right which is alone cognizable in a court of equity. An alleged legal right alone being involved, the remedy of the complainant is in a court of law, and he cannot resort to a court of equity except he brings his case within some acknowledged head of equity jurisdiction. This principle is the more imperative because the very constitutional provision upon which the complainant relies (Sec. 21, Art. II.) provides that the compensation to which a damaged property owner is entitled "*shall be ascer-*" *tained by a jury* or a board of commissioners of not " less than three freeholders, in such manner as may " be prescribed by law," not by a court of equity. The defendant's right to have the damage ascertained by a jury cannot be taken away, except a case is made which entitles the complainant to go into a court of equity, which in a case of this nature—to protect a legal right—can only be upon the ground that the damages are irreparable or destructive. Here the complainant's case fails, for, as hereafter shown, the fact of any actual damage, even to the most trifling

extent, was not satisfactorily established—to say nothing of irreparable or destructive damage.

The Constitution of Missouri, Section 21, Article 2, inserted in the usual eminent domain clause of our Constitutions the words "or damaged" after the word "taken." There is necessarily a distinction such as this provision of the Constitution recognizes between the *taking* of property and the *damaging* of property. In either case the Constitution, as amended, provides that it shall not be taken or damaged for public use without just compensation, to be ascertained by a jury or Board of Commissioners as may be prescribed by law, with the further provision that "until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested." Where the property is "taken" this provision is applicable, and the provision is that the property shall not be disturbed, or the proprietary rights of the owner divested, until the compensation is made. It does not follow, even where the property is "taken," that the owner is in all cases entitled to an injunction, for no cast-iron or fixed rule can be laid down as to whether any party is or is not entitled to an injunction; but the point which we wish to emphasize is this: That in cases where no property is "taken," and where there is no complaint, except the one that property has been consequentially "damaged" or injuriously affected by the proximity of a public improvement, the last portion of this section has no application, for in such cases there is no disturbance of the property and no divestiture of the proprietary rights of the owner; and therefore plaintiff's contention, based on the clause of the Constitution, requiring com-

pensation before disturbance of property or divestiture of proprietary rights, has no application to the present case, since the laying of the track on the street in front of his property is merely a case of damage, and not a disturbance of the adjoining property or a divesting of the abutter's proprietary rights.

Where property is "taken" the Statutes of Missouri give either party the right to exercise the right of eminent domain, the damages to be assessed by a jury or Board of Commissioners under the Constitution; but where property is merely "damaged" the power to condemn is not given, and there is no remedy by either party, except by action or suit (see on this point Opinion of THAYER, J., Record, p. 89; Opinion of BREWER, C. J., C. C., in McElroy vs. Kansas City, 21 Fed. Rep., 259).

The complainant could have sued at law for damages. He must sue at law unless he states in his bill of complaint, and proves at the hearing, the existence of some special ground of equitable jurisdiction. In Chicago vs. Taylor, 125 U. S., 161, approving Rigney vs. Chicago, 102 Illinois, 64, where this Court fully considered the "damage" provision of the Constitution of Illinois, the action by the lot owner was one at law for damages.

These two cases, which were cases where by reason of the construction of a viaduct the access to property was impaired and property rendered subject to flooding and otherwise injured, the Supreme Court of Illinois and this Court thus construed the word "damaged" as used in the Constitution, namely: That this constitutional provision requires compensation to be made, not only where the property is actually invaded, but also where it appears that "there has been a

physical disturbance of a *right*, either public or private, which the property owner enjoys *in connection with his property*, and which gives to it an additional value, and that by reason of such disturbance he has sustained damages with respect to his property in excess of that sustained by the public generally." In the case now under consideration it is submitted that in any view the complainant failed to establish any physical disturbance of a right within the meaning of this authoritative exposition of the constitutional provision in question—at all events no such damage as under the circumstances of this case entitles him to a writ of injunction or any other equitable relief, for *non constat* a jury would find his damage merely nominal, and if he had resorted to the proper action and recovered his damage it would have been paid. There is no allegation or pretense in this case that the defendant company is insolvent or unable to respond in damages.

The distinction between property rights and a mere right to damages is important as bearing on the question of equitable relief by way of injunction. Even where property rights are concerned the principle "on which the Court interferes by injunction is the inadequacy of the remedy by damages, and therefore the Court will not grant an injunction where damages in an action would give adequate remedy" (Garrett on the Law of Nuisances, p. 326).

Where property rights are concerned and where the plaintiff "in an action at law has obtained or could obtain merely nominal damages, still, if the right be of great value, the Court will grant an injunction to prevent the necessity of bringing a series of actions in the

same matter which would occur where the extent of injury inflicted at one time was small and only nominal damages could be recovered" (*Ib.*, 327). But where the right of the plaintiff, as in this case, is wholly the result of positive creation, and is not a right of property, but is simply a right to damages, the rule applicable to such cases is that the right involved is a legal right, and therefore the remedy is in a court of law, unless the damages are irreparable or destructive, and of such a nature as not to be compensated for in money.

The complainant insists that, upon the conflicting and unsatisfactory proof in respect to damage presented by the record, it was entitled *as of right* to a permanent injunction, restraining the operation of the railroad in Gratiot street. It insists that it was of right entitled to this extraordinary remedy, notwithstanding that the fact which must have constituted the fundamental basis of any right to equitable relief—*the fact of actual damage*—was not satisfactorily established by it, and that the proof in this respect left the mind of the Chancellor wholly unconvinced, and with, at best, the opinion that, while the proof tended to show *some slight and inconsiderable damage*, the fact was doubtful, and the case was one in which a jury might reasonably find that no damage had been sustained. It seems to us that the complainant has misconceived the extent and nature of its right to relief in a court of equity. That the writ of injunction is one of grace, and not of absolute right; that it will not be granted where the complainant has an adequate remedy at law, and where, if it were issued, it would operate to produce inconvenience and damage disproportionately serious; that it will not issue where the proof does not clearly and certainly establish the

right of the complainant, or leaves the mind of the Chancellor in any doubt or uncertainty—all these are considerations which do not seem to have suggested themselves to the complainant or its counsel.

Referring again to the fact that the record shows no exceptions whatever taken to the rulings of the Court admitting or rejecting testimony, it may be profitable to quote again from that part of the opinion of the Court stating the result of the evidence:

"There is some testimony before the Court to that effect, but the inconvenience resulting from such interference is evidently very slight. I will also add that it is by no means certain that the value of complainant's property is impaired in the manner above stated. Opinions *pro* and *con* were expressed on that point by the various witnesses. A jury called to try the issue and assess the damages might reasonably find that no damage had been sustained in consequence of the laying of the track, or that the damages were inconsiderable. The Court is of the opinion that the use of the track has not seriously obstructed, and will not in future seriously obstruct, access to complainant's premises, and that the damage done to its property in the way of lessening its marketable value or rental is, in any event, small" (Record, p. 89).

If the complainant were not damaged by the construction of the track in Gratiot street, it is, of course, obvious that it would not be entitled to any relief whatever, either by way of injunction or damages. If the injury to complainant's property were doubtful or problematical, a court of equity would, under established principles, refuse to interfere by the extraordinary process of injunction. At best for the complainant here, its case presents the latter aspect.

As was said by this Court in the case of *Hewitt vs. Campbell*, 109 U. S., 103:

"The record discloses a serious conflict in the testimony of witnesses, and the court below might well have dismissed the bill upon the sole ground that the complainant had failed to establish the facts upon which he based his claim for relief, and which must have been established before any relief could be granted."

A further consideration affecting the mind of the court below was that the plaintiff had sought no preliminary restraining order, and, without any application for restraint other than the filing of its original bill, had permitted the construction of the track and its operation for a period of nearly two years before the case was brought to trial. The commentary of this acquiescence upon the complainant's claim of serious inconvenience and damage, is direct and significant.

III. Relief by injunction will not be granted where an ultimate right of defendant will be destroyed or seriously impaired, while the rights of complainant may be adequately protected otherwise.

It is true, and it is not disputed by complainant (Brief for Complainant, p. 52) that there is, as suggested by the Court below, *no proceeding which the defendant can take to obtain an assessment of the damages, if any, sustained by complainant* through the location and operation of the track in Gratiot street. The Statutes of Missouri provide for the assessment of damages resulting from the *taking* of property for public use, but there exists no provision for assessing damages where it is claimed that the property is merely "*dam-*

aged for public use." This state of the law is discussed by Mr. Justice BREWER in his opinion (when Circuit Judge) in the case of *McElroy vs. Kansas City*, 21 Federal Reporter, 257.

He said:

"It is obvious that this question is of momentous importance, for, as no provision has been made for ascertaining the damages to property not taken, the only way that this can now be ascertained is by personal agreement, which, if the claim of complainant is wholly sustained, would place every public improvement at the mercy of any party whose property is injured thereby."

The situation, therefore, in which the complainant sought to place the defendant was one of absolute restraint by an unconditional injunction, which would have been permanently operative by reason of the fact that the defendant is without any legal remedy provided by law, to assess damages of the character claimed by the complainant. The granting of the order sought would have presented this dilemma to the defendant: It must either have acquiesced in the perpetual restraint of the injunction, or, at this disadvantage and in this helpless situation, have undertaken to agree with complainant as to the amount of damages. We need not argue that to place a defendant in this predicament would not be a characteristic action of a court of equity. Even in a case where the damages to the defendant are conceded to be actual and of serious character, a court of equity will find a way in which to do justice to both parties without placing the defendant in a predicament so unjust and inequitable. It will so conform its decree as to protect, as well as to enforce, the rights of the parties, as was done by Judge BREWER

in the case last cited (*McElroy vs. Kansas City*), and, as was directed by the Circuit Court of Appeals of the Eighth Circuit, in the recent case of *Kansas & Arkansas Valley Railway vs. Payne*, 49 Federal Reporter, 114 (Opinion by THAYER, J.).

This entire subject is examined, and the considerations affecting the action of the Court in granting or withholding injunctive relief in cases of this nature, are discussed in the instructive opinion of MR. JUSTICE BREWER (then Circuit Judge) in the case of *McElroy vs. Kansas City* (21 Federal Reporter, 257), referred to above. In that case the complainant sought an injunction to restrain the improvement of a street, in front of his lot, involving the changing of the grade. The effect of making the improvement as contemplated by the city ordinance would have been to leave the lot of complainant many feet above the surface of the street, and, as found by the Court, to seriously affect the value of the property. The opinion discussed the effect of the use of the word "*damaged*" in constitutional provisions requiring compensation for property taken or damaged for public use, and, proceeding to a consideration of the elements underlying injunctive relief and the action of the Court in granting such relief, the learned JUSTICE said:

"FIRST. A Chancellor, in determining an application for an injunction, must regard not only the rights of the complainant which are sought to be protected, *but the injuries which may result to the defendant or to others from the granting of the injunction.* If the complainant's rights are of a trifling character, if the injury which he would sustain from the act sought to be enjoined can be fully and easily compensated, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer a

large inconvenience if the contemplated act was restrained, the lesser right must yield to the larger benefit; the injunction should be refused, and the complainant remitted to his action for damages. This rule has been enforced in a multitude of cases, and under a variety of circumstances, and is one of such evident justice as needs no citation of authorities for its support.

"SECOND. When the defendant has an ultimate right to do the act sought to be restrained, but only upon some condition precedent, *and compliance with the condition is within the power of the defendant*, injunction will almost universally be granted until the condition is complied with. This principle lies at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, *for in all those cases the Legislature has placed at the command of the defendant means for ascertaining the value of the property.* In those cases the courts have seldom stopped to inquire whether the value of the property sought to be taken was little or great, whether the injury to the complainant was large or small, but have contented themselves *with holding that, as the defendant had full means for ascertaining such compensation*, it was his first duty to *use such means*, determine and pay the compensation, and until he did so the taking of the property would be enjoined.

"THIRD. Where the defendant has an ultimate right to do the act sought to be enjoined upon certain conditions, *and the means of complying with such conditions are not at his command, the courts will endeavor to adjust their orders so on the one hand as to give to the complainant the substantial benefit of such conditions, while not restraining the defendant from the exercise of its ultimate rights.* Thus, in the case at bar, the defendant has, of course, the ultimate right to grade this street, as a condition of such right is a payment of damages, but it has no means of ascertaining those damages; no tribunal has been created, no provision of law made for their ascertainment. Hence, if possible, the Court should provide for securing to the defendant this ultimate right, and at the same time give to the complainant the substantial benefit of the prior conditions."

Judge BREWER found that, in the case before him, it

was evident the injury to complainant's lot *would be serious*. But, conformably with the views stated in his opinion, he proceeded to direct the entry of an order so framed as to justly protect the ultimate right of the defendant, while granting to the complainant all the relief that he was entitled to in view of that ultimate right. He said :

"The order, therefore, will be that upon the giving of a bond in the sum of $3,000 and the filing of a stipulation to accept such damages as shall be ascertained in the manner hereinafter provided, in full satisfaction of all claims against the defendant, the defendant will be restrained from grading said street: provided that at any time the defendant may, upon twenty days' notice, apply to either of the judges of this Court for the appointment of a board of commissioners of three freeholders, to ascertain and report the amount of damages which complainant will sustain by reason of the grading of said street, and upon the payment of the damages so reported by such commissioners the injunction will be vacated. The report of a majority of the commissioners will be the report of the board, and either party may appeal to the judge appointing such commissioners for a review of their report."

In the case of *Kansas & Arkansas Valley Railway vs. Payne*, 49 Federal Reporter, 114, Congress had authorized the defendant railway company to construct a bridge across the Arkansas River, at Fort Smith, in the Indian Territory, "and to maintain and operate the same as a railway, passenger and wagon bridge." When the approaches suitable for wagons and foot passengers, as well as for railways, were being constructed, the railway company was enjoined by the United States Circuit Court at the suit of the owners of the land at the river side through whose property a right of way had been previously

condemned, and who claimed that a ferry privilege had been granted to them by lawful authority and was "attached to the land," and that they had for years operated a ferry at that point. The Circuit Court of Appeals (Judges CALDWELL, SHIRAS and THAYER), said:

"The damages, if any, to which the appellees can lawfully law claim, are certainly very small, if not purely nominal. We recognize the rule that legal rights of every description are entitled to protection, no matter how small their money value may be, but a court of equity is not bound to afford to protection by an unconditional order of injunction, when adequate relief may be afforded in some other manner, whether the right involved is of great or little value. *Bassett vs. Manufacturing Co.*, 47 N. H., 437; *McElroy vs. Kansas City*, 21 Fed. Rep., 257; *Erie R. Co. vs. Delaware, L. & W. R. Co.*, 21 N. J. Eq., 291, 292. We are of the opinion that the Circuit Court would have gone quite far enough in the case at bar, had it required the appellant to give a bond in a reasonable sum, not exceeding $2,500, conditioned to pay such damages, if any, as the complainants below might thereafter be adjudged to be entitled to, by any court of competent jurisdiction, in consequence of the alleged additional servitude imposed or threatened to be imposed on its right of way. Entertaining these views, the order of injunction appealed from is hereby vacated and annulled, the existing injunction is dissolved, and the cause is remanded to the lower court with directions to take a bond for the protection of the appellees not exceeding the amount, and with conditions as above indicated."

In the case of *Stetson vs. The Chicago & Evanston R. R. Co.* (75 Illinois, 74), it is held that where a railway company, under authority from a city, has located its road upon a public street or other lands not belonging to the complainant, and is constructing the same upon which to operate its trains, a court of equity will not entertain a bill to restrain the

operation of the road until the complainant's damages to lots owned by him abutting on the street are ascertained and paid, but will leave him to his remedy at law.

See also the case of *Hutton vs. London & Northwestern R. R. Co.*, 7 Hare, 26.

IV. In complainant's bill there is no prayer that damages be assessed either directly or as a condition precedent to the granting of an injunction; on the contrary, the Court was practically precluded from assessing damages by the statement of counsel (Record, p. 12) to the effect that no assessment was asked for. The only relief sought was an unconditional injunction against the construction of the track and against the possession and use of the street. Inasmuch as the damages to complainant's property, if any, can be fully compensated in money, the granting of an unconditional injunction would be inequitable and unjust.

Defendant had the legislative and municipal authority to lay its track on the street in precisely the manner it did. It is not a trespasser or wrongdoer. Its track is rightfully there. If the damage, if there be any, is not *damnum absque injuria*, still at most there is but one question and that is the amount of such damage. This is primarily and essentially a legal question. It is a legal right purely.

If the legal right is doubtful or the damage is doubtful or remediable at law and especially where the damages to the defendant would be serious, equity will refuse an injunction.

In Thomas vs. Mutual Protective Union, 121 N. Y., 45, this Court, by RUGER, C. J., said (p. 51):

"It is therefore a cardinal rule of equity that it will not entertain jurisdiction of cases where there is an adequate remedy at law, or grant relief, unless for the purpose of preventing serious and irreparable injury (McHenry vs. Jewett, 90 N. Y., 58; People vs. Canal Board, 55 N.Y., 394). These principles are elementary, and lie at the foundation of all equitable jurisdiction. Equity, therefore, interferes in the transactions of men by preventive measures only when irreparable injury is threatened, and the law does not afford an adequate remedy for the contemplated wrong."

In McHenry vs. Jewett, 90 N. Y., 58, ANDREWS, C. J., said (p. 62):

"It is not sufficient to authorize the remedy by injunction that a violation of a naked legal right of property is threatened. There must be some special ground of jurisdiction, and, where an injunction is the final relief sought, facts which entitle the plaintiff to this remedy must be averred in the complaint, and established on the hearing. The complaint in this case is bare of any facts authorizing final relief by injunction. * * * No facts justifying these conclusions are stated, and the mere allegation of serious or irreparable injury, apprehended or threatened, not supported by facts or circumstances tending to justify it, is clearly insufficient. Neither injury to the plaintiff's property, inadequacy of the legal remedy, or any pressing or serious emergency, or danger of loss, or other special ground of jurisdiction, is shown by the complaint. The complaint, therefore, does not show that the plaintiff is entitled to final relief by injunction."

In Bigelow vs. Hartford Bridge Co., 14 Conn., 565, STORRS, J., said (p. 580):

"Of whatever character it is requisite that the injury complained of should be, in order to lay the foundation for this remedy, it is necessary that it should be a substantial, and not merely a technical or inconsequential, injury. There must not only be a violation of the orator's rights, but such a violation as is, or will be, attended with actual or serious damage. Even though the injury may be such that an action at law would lie for damages, it does not follow that a court of equity would interpose by the summary, peculiar and extraordinary remedy of injunction."

In Eastman vs. Amoskeag Manufg. Co., 47 N. H., 78, the Court said that plaintiff's injunction suits should show by their proof "a case of strong and clear injustice, of pressing necessity and imminent danger, of great and irreparable damage, and not of that nature for which an action at law would furnish a full and adequate indemnity."

Elmhirst vs. Spencer, 2 Mac N. & Gordon, was an action for an injunction to prevent polluting a stream. Chancellor COTTENHAM said (p. 50):

"Now, the plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the defendant as would have entitled him to a verdict in an action at law for damages. * * * In such case, and in the similar case of alleged obstruction to the use of light, there must be both an unwarrantable use and injury resulting from such use."

In Livingston vs. Livingston, 6 Johns. Ch., 497, Chancellor KENT said (p. 501):

"There must be something particular in the case so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy."

These principles are applied by courts of equity in